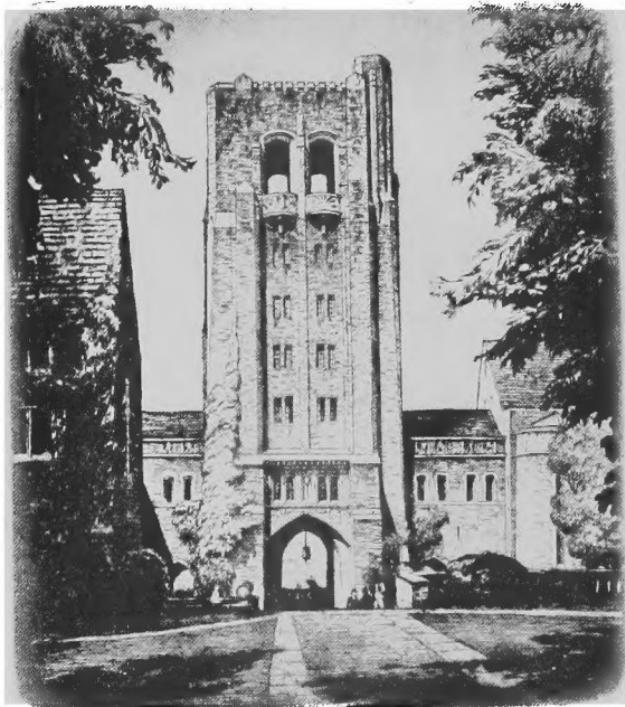


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A T R E A T I S E  
ON THE  
**LAW OF CONTRACTS.**

BY  
**WILLIAM W. STORY,**  
COUNSELLOR AT LAW.



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Obligamur aut re, aut verbis, aut simul utroque, aut consensu, aut lege, aut jure honorario  
aut necessitate, aut peccato. — PANDECTÆ JUSTINIANÆ.

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IN TWO VOLUMES.

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# LAW OF CONTRACTS.

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## CHAPTER XXI.

### CONSTRUCTION OF CONTRACTS.

§ 631. INASMUCH as every contract derives its force from the mutual assent of the parties thereto, to certain terms, it becomes necessary, not only to interpret those terms, in order to ascertain the intention of the parties in entering into the agreement, but also, so to construe them, as to give a legal operation to such intention. The collection of such intention, by inferences from stated terms, or from actual circumstances, or both, is the office of interpretation. The adjustment of such intention to paramount law, is the office of construction.<sup>1</sup>

§ 632. Language is not only imperfect, and susceptible of various interpretations, but is also so liable to the careless misuse or ignorant misapplication of terms, that some rules of interpretation and construction seem to be absolutely necessary, in order to render agreements either intelligible or consonant with the intentions of the parties. An agreement to do a single definite act, upon a certain consideration, is simple,

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<sup>1</sup> See Lieber's Legal Hermeneutics.

and easily interpreted. But where a general object is to be attained by means of a multitude of different stipulations dependent upon future contingencies, it must evidently be matter of great difficulty, and indeed, almost of impossibility, to anticipate all events and circumstances materially affecting the contract. In such cases, the contract in itself, however well drawn, if unexplained by inferences drawn from attendant circumstances, or from the general tenor of the instrument, would often be unintelligible or inoperative. The object, therefore, of interpretation and construction, is, so to expound the contract, as to render it legal and valid, as well as operative in effecting the purpose and object which it was designed to accomplish.

§ 633. The general rules of interpretation and construction are the same both in law and in equity;<sup>1</sup> and are equally applicable to specialties and simple contracts.<sup>2</sup> Courts of equity have, however, assumed larger powers than courts of law, in the application of these rules, by which they are enabled to reach cases, which, however equitable, could not be enforced in a court of law. Wherever, therefore, a precise and strict conformity to the grammatical meaning of the terms of a contract would be impossible, they will be so modified, as to render them as nearly coincident as possible, with the actual and evident intent of the parties. Thus, a strict compliance with the terms of a contract is generally necessary to entitle either party to enforce it against the other at law; but if the non-compliance do not affect the essence of the contract; as if the contract be broken in respect of time or mode of its perform-

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<sup>1</sup> 3 Black. Comm. 431; *Doe v. Laming*, 2 Burr. 1108; 1 Fonbl. Eq. 5th ed. 149, note b.; *Eaton v. Lyon*, 3 Ves. 692; *Ball v. Storia*, 1 Sim. & Stu. 210.

<sup>2</sup> *Seddon v. Senate*, 13 East, 74, per Ld. Ellenborough; *Hewet v. Painter*, 1 Bulst. 174, 175; *Kane v. Hood*, 13 Pick. R. 281; *Robertson v. French*, 4 East, R. 130.

ance, when neither time nor mode of performance were essential considerations, a court of equity will grant relief, if the circumstances under which relief is claimed be equitable.<sup>1</sup>

§ 634. The first rule of exposition, which originates and governs every other rule, is, that the contract shall be so interpreted, as to give effect to the intention of the parties, as far as it is legal, and mutually understood. *Verba intentioni, non e contra debent inservire.* Whenever such intent can be distinctly ascertained, it will prevail, not only in cases where it is not fully and clearly expressed, but also, even where it contradicts particular terms of the agreement. The object of the law in laying down rules of exposition, is to discover the meaning of the parties, and not to impose it, and the expression is, therefore, wholly subservient to the manifest intention.<sup>2</sup> Although, therefore, descriptive words be used in a written instrument, which are, when taken with reference to the existing facts, repugnant or inconsistent with each other, yet, if the intent of the parties be clearly manifested thereby, the misdescription will not vitiate the instrument.<sup>3</sup> Thus, where the condition of a bond of £2,000 was to "render a

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<sup>1</sup> 2 Story on Equity Jurisp. §§ 736, 747, 771, 776, 777, 779; *Hipwell v. Knight*, 1 Younge & Coll. 415; *Doloret v. Rothschild*, 1 Sim. & Stu. 590.

<sup>2</sup> *Throckmorton v. Tracy*, Plowd. 160; *Shep. Touch.* 86; *Simond v. Boydell*, Doug. 271; *Aguilar v. Rodgers*, 7 T. R. 423; *Bache v. Proctor*, 1 Doug. 328; *Dormer v. Knight*, 1 Taunt. 417; *Doe v. Worsley*, 1 Camp. 20; *Doe v. Laming*, 4 Camp. 77; *Tombs v. Painter*, 13 East, 1; *Quackenbos v. Lansing*, 6 Johns. 49. Lord Chief Justice Hobart in *Clanrickard v. Sidney*, Hobart, R. 277, said: "I do exceedingly commend the judges, that are curious and almost subtle, astute, (which is the word used in the Proverbs of Solomon in a good sense when it is to a good end,) to invent reasons and means, to make acts according to the just intent of the parties, and to avoid wrongs and injury, which by rigid rules might be wrought out of the act." This language is approved by Lord Hale in *Crossing v. Scudamore*, 1 Vent. R. 141; and by Chief Justice Willes in *Doe v. Salkeld*, Willes, R. 676, and *Parkhurst v. Smith*, Willes, R. 332. See post, § 640, note.

<sup>3</sup> *Cleaveland v. Smith*, 2 Story, R. 287.

fair, just, and perfect account, in writing, of all sums received;" it was held to be broken by a neglect on the part of the obligor to pay over such sums; for Lord Mansfield said, it was clearly the intention of the parties that the money should be paid; and Buller, J., added, that it could not be meant, that so large a penalty should be taken merely to enforce the making out of a paper of items and figures.<sup>1</sup> So, where the owners of several parcels of land, through which there was a private way, having a gate across it, entered into covenants, by indenture, for widening the way, and the following memorandum was subjoined to the indenture,—“The gate above mentioned is to be kept up, except by the consent of the parties;” it was holden, that the intent of the parties was, that the gate should be upheld, until, by agreement, it should be taken down; and then, that it was to remain down for ever.<sup>2</sup> So, also, a covenant by a lessee not to exercise the trade of a butcher upon the demised premises, was held to be broken by his selling raw meat by retail, although no beasts were slaughtered there; because it was the manifest intention of the lessor to preclude the exercise of the trade in any form, in order to prevent a depreciation in the value of the tenement.<sup>3</sup> So, also, where a contract was made in London, for the sale of tallow, then at sea, in which it was agreed that if it did not arrive at a particular time the contract should be void; it was held, that the evident understanding was, that it was to arrive at London, and not elsewhere; and as it did not arrive there, the contract was void.<sup>4</sup>

§ 635. This rule does not, of course, apply to those cases where there was a fraudulent intention, or where one party purposely misled the other; for, under such circumstances, to

<sup>1</sup> *Bache v. Proctor*, 1 Doug. 382.

<sup>2</sup> *Fowle v. Bigelow*, 10 Mass. 379.

<sup>3</sup> *Doe v. Spry*, 1 Barn. & Ald. 617. See, also, *Dormer v. Knight*, 1 *Taunt.* 417; *Doe v. Keeling*, 1 *Maule & Selw.* 95.

<sup>4</sup> *Idle v. Thornton*, 3 *Camp.* 74.

give effect to the real intention, would be to reward dishonesty. The undertaking of each must be construed in that sense, in which he supposed it to be understood by the other. Thus, where a note was made by a debtor, and given by him to his creditor, "for £20, borrowed and received," "which I promise never to pay;" it was held to be properly described as a promissory note, on which the maker was liable.<sup>1</sup>

§ 636. When some of the terms of the agreement contradict the manifest intention, as clearly indicated by the agreement taken as a whole, the intention governs. Thus, where the condition of a bond for payment of money was, that the bond should be void if the money was *not* paid; it was held to be wholly inconsistent with the nature of the bond itself, and was therefore rejected, leaving the bond in full force as a perfect contract.<sup>2</sup> So, also, a note or bill of exchange, made payable to the order of a fictitious person, in whose name it is indorsed, will, in favor of a *bonâ fide* holder, without notice of the fraud, be held to be payable to the bearer.<sup>3</sup> The same rule applies to cases where an evident mistake has been made in an instrument.<sup>4</sup> Thus, an agreement, to convey "the Hawkins lot, containing one hundred acres," was held to convey the whole lot set off to Hawkins, and answering to the general description, although it contained one hundred and six acres.<sup>5</sup> So, also, where a bond was given, conditioned to pay one hundred pounds, by six equal instalments, on certain

<sup>1</sup> Simpson *v.* Vaughan, 2 Atk. 32.

<sup>2</sup> Vernon *v.* Alsop, T. Ray. 68; 1 Lev. 77; s. c. 1 Sid. 105; Mills *v.* Wright, 1 Freem. 247. See also Finch's Law, 52; Stockton *v.* Turner, 7 J. J. Marsh. 192; Gully *v.* Gully, 1 Hawks, 20; Ayres *v.* Wilson, 1 Doug. 385; Simpson *v.* Vaughan, 2 Atk. 32.

<sup>3</sup> Gibson *v.* Minet, 1 H. B. 590; Collis *v.* Emmet, 1 H. B. 313; Tatlock *v.* Harris, 3 T. R. 176; H. B. 316, note.

<sup>4</sup> Saville, 71, pl. 147. See Weak *v.* Escott, 9 Price, 595; Crowly *v.* Swindles, Vaugh. 173; Ferguson *v.* Harwood, 7 Cranch, 414; Cleaveland *v.* Smith, 2 Story, R. 279.

<sup>5</sup> Butterfield *v.* Cooper, 6 Cowen, 481; Stebbins *v.* Eddy, 4 Mason, 414.

specified days, "until the full sum of *one* pound should be paid," the court allowed the word *hundred* to be inserted after *one*, in order to effectuate the evident intention of the parties.<sup>1</sup> So, where a certain farm was sufficiently described in a deed to identify it, and was referred to as being Lot No. 17, whereas it was not Lot No. 17, it was held, that such incorrect reference must be rejected, because the lot was sufficiently identified without it, and to give effect thereto would be to invalidate the deed.<sup>2</sup> So, also, where a devise is made of a *black* horse, when the testator has only a *white* one; or of *freehold estate*, when he has only *leasehold* estates, his will would be interpreted to apply to the *white* horse, or to the *leasehold* estates.<sup>3</sup>

§ 636 a. But in all such cases it should appear, either that there was a plain mistake of parties in writing out the contract, or that the instrument, taken as a whole, contains within itself ample evidence of the intention of the parties,—for the clear terms of a written contract cannot be contradicted by any external evidence of a different intention, but only explained thereby. It is only where the terms are self-contradictory, or doubtful and ambiguous, or mere mistakes, that they are to be warped from their apparent meaning.<sup>4</sup> The only exception to this rule would seem to be where the terms of the written agreement are so inconsistent with the manifest intention of the parties, as to operate as an entire nullification of the contract, in which case the terms would be construed so as to give effect to the intention. Thus, in a case before cited, where a bill of exchange was made payable to a fictitious person *or order*, it was held that, inasmuch as the actual terms would reduce the contract to a mere nullity,

<sup>1</sup> Waugh *v.* Bussell, 5 Taunt. 707.

<sup>2</sup> Worthington *v.* Hylyer, 4 Mass. 205.

<sup>3</sup> Door *v.* Geary, 1 Ves. sen. 255; Day *v.* Trig, 1 P. Wms. R. 286; Wigram's Interp. of Wills, p. 54, § 67.

<sup>4</sup> Parkhurst *v.* Smith, Willes, R. 332; Post, ch. 22. See also note to § 640.

it should be construed as payable to bearer, it being impossible to conceive that the parties intended to make an utterly illusory and null agreement; and because, if such were the intention of the makers, it was a fraud.<sup>1</sup>

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<sup>1</sup> Collis v. Emett, 1 H. Black. R. 313; Gibson v. Minet, 1 H. Black. R. 569. In this case, however, there was a strong difference of opinion, and the judges gave elaborate opinions. Barons Hotham, Perryn, Thomson, and Gould held that the bill should be construed as payable to bearer. On the other hand, the Lord Chief Baron Eyre dissented in a very able opinion, and he was supported by Mr. Justice Heath. After the delivery of their opinion a debate took place, in which Lords Kenyon, Loughborough, and Parkhurst spoke in favor of the judgment, and the Lord Chancellor Thurlow against it. Perryn, B., said: "As to the second question, namely, Whether upon the matter found in the special verdict, the bill mentioned in the fifth count can be deemed in law a bill *payable to bearer*? These facts appear in the special verdict; that the name of John White indorsed on the bill, was done by the drawers previous to the receiving the full value from the defendants in error; that Gibson and Johnson afterwards, with full knowledge that John White was a nonentity, and that no person with that name had indorsed the bill, accepted it. This circumstance being known to the acceptors, there was no imposition upon them, they have with their eyes open ratified and confirmed the acts of the drawers, guaranteed the payment of the bill, and undertaken to discharge it. In the case of drawing bills of exchange to the order of a fictitious payee, the drawer and acceptor, knowing the fact, have no reason to complain of any injury to them. The acceptor, either upon the credit, or for the honor of the drawer, engages to pay the bill when due, and can never be discharged from that engagement except by satisfying the bill, which if he once does to the *bonâ file* holder, he can run no risk of any claim from a fictitious payee. Every person whose real name and signature appears on a bill of exchange, is responsible to the extent of the credit he gives to it in the negotiation of it. It is contrary to justice, and not to be endured, that fraudulent drawers and acceptors should receive benefit by their own acts, and their estates be exonerated from the demands of their just creditors. The claim of the defendants in error certainly in justice and equity ought to be supported, and I think it may in law be maintained upon the fifth count, as on a bill *payable to bearer*. The intent of the drawers and acceptors of the bill seems to be, to have made a negotiable instrument; and if for any defect, it cannot be made so by indorsement, it is reasonable it should be made valid in any way in which that effect can be produced; and there does not occur to me any rule of law to prevent its being made good by *delivery*. If a bill

§ 637. Again, the general rule, in the interpretation of descriptive words used in deeds and grants and contracts is, that

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be made payable to a person not existing, it operates as a bill payable to bearer. Where the bill is in the hands of a purchaser for a full and valuable consideration *bonâ fide*, and the acceptor, before his acceptance, is privy to the non-existence of the payee, and who cannot give an order, it is in effect and in point of law the same thing as if made payable to the *holder*, namely, the *bearer*. Many instruments may be enforced contrary to the words, Co. Litt. 45, a. 301 b., words of demise may operate as a grant, covenant to stand seized, confirmation, and in other ways: at one time they may operate as a lease, at another time as a confirmation, in order to preserve right and do justice, the law being anxious and astute to obtain those purposes. In the case of Stone v. Freeland, cited 3 Term Rep. B. R. 176, Lord Mansfield said, in bills of exchange names of payees were often used of persons not having existence, and such bills indorsed by the drawer; and if, with knowledge of that fact, a bill is accepted and put in circulation, it shall not lie in the acceptor's mouth to say, the bill is a bad one. And in that case Lord Mansfield held, that the acceptor was liable, though there was a fictitious payee, and that such acceptor should not be at liberty to deny the validity of the bill, which by lending his acceptance he had put in circulation. In Peacock v. Rhodes, Doug. 632, Lord Mansfield, in giving the opinion of the court, said, 'The law was settled, that the holder of a bill coming fairly by it, has nothing to do with the transaction between the original parties, except in the single case of a note for money won at play.' Price v. Neale, 3 Burr. 1354, was the case of a forged bill, which had been accepted and paid to the defendant in the course of trade; there Lord Mansfield held, that the acceptor having given credit to it by his acceptance, should not recover back what he had paid to a *bonâ fide* holder. In Collis v. Emmett, Term Rep. C. P. 313, where a bill was made payable to a fictitious payee or order, it was holden that the indorsee might maintain an action against the drawer, as on a bill *payable to bearer*. Under the circumstances stated in this special verdict, I see no distinction that can be made between the drawer and acceptor of such bill. The bill indeed in this case, as in Collis v. Emmett, is payable to John White or order, but before the plaintiffs in error accepted it, they knew that John White was not in existence, and could not make an order: the indorsees, ignorant of that fact, pay a full value for the bill; the acceptors have, by lending their name, given circulation to the bill, and have, as I conceive, undertaken to pay the bill to such person as shall be the *bonâ fide* holder: their engagement is to pay the bill, in any way in which it can take effect. Upon the whole, therefore, I concur with the judgment of both the courts of King's Bench and Common Pleas, and my answer to the second question is, that

courses, distances, admeasurements, and ideal lines, must yield to known and fixed monuments upon the ground itself, refer-

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upon the matter found in the special verdict, the bill mentioned in the fifth count may be deemed in law, a bill *payable to bearer*."

Gould, J., said: "Upon the supposition that the opinion I entertain and have delivered on the first count should be conceived not to be tenable, the next consideration will be, whether the ground taken by the Court of King's Bench, to construe it to be a bill, under the circumstances of the case, payable to *bearer* is right, *ut res magis valeat quam pereat*; whether, when it is impossible for the instrument to operate literally, the equity of the law will not put such a sense upon it as will answer the intention of the parties, and give it effect. It would be enough to say, to give it effect to the innocent party, but I do not hesitate to speak plurally, the *intention of the parties*, since it appears that both drawers and acceptors knew it could not have effect literally in the form in which it was fabricated, and as I have already observed, the law will not endure that they should allege that their intention was fraudulent; for *allegans suam turpitudinem non est audiendus*. It is a rule of law, that every instrument shall be construed in the most forcible manner against the maker. The argument then results to this: it was in the power of the drawers and acceptors (for it is evident they acted in concert) to have framed the bill to be payable to a real person or order, or to *bearer*, and in either case it would have been effectual to charge the drawers, and after acceptance the drawees. But they do not choose to take the first course, and it is highly probable (I might say apparent) that the reason was, they knew that no substantial payee would indorse the bill, and so their purpose in that form would be defeated. They therefore resort to an elusory form, which could not in that shape have any force or effect. It remains then that it should be construed that *they meant* the bill should be *payable to bearer*, as being the only way in which, in its original formation, it could take effect and oblige them as a bill of exchange. No violence is done; it follows and enforces what must be *presumed to be* *their intention*, the payment to the person justly entitled to the money. No inconvenience can ensue, because by the satisfaction of the bill all further circulation of it is at an end. For these reasons I am of opinion that the Court of King's Bench had sufficient foundation to decide for the plaintiffs on the fifth count."

Lord Chief Baron Eyre said: "With the drawers of this declaration I am at issue, with respect to the sixth count, upon a very short point. They say that a bill drawn to a fictitious payee is a bill payable to *bearer*, according to the effect and meaning of it: I say that such a bill is a mere nullity. To my apprehension it is not a very sound argument that it must be payable to *bearer* because it cannot be payable in any other manner.

red to in such instrument, whether they be natural or artificial. And this rule obtains upon the clear ground, that there is a

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I observe that it is not even stated in the sixth count, that by reason of the payee being fictitious the bill became payable to bearer, *according to the usage and custom of merchants*; but the words '*according to the effect and meaning of the bill*', are substituted in the room of those other words. Upon what authority was it said that such was the effect and meaning of this bill? It is directly contrary to the purport of it. If the intention of the drawers, the acceptors, or the plaintiffs themselves will assist us to find out the intent, which the purport of the bill is to be supposed not to have sufficiently conveyed, they all consider this bill as a bill not payable to bearer, but as a bill to pass by indorsement in strict conformity to its purport; and there are in fact indorsements upon it. Where then is the authority for the averment, that it was according to the effect and meaning of this bill that the contents should become payable to bearer. Is there any better proof of this averment, than it must be so, because it could not be payable to order?" "I have not forgot that an argument has been drawn from a supposed analogy between bills of exchange and deeds, to prove that a court of justice ought to new mould a bill of exchange, and construe a bill drawn payable to order to be a bill payable to bearer, *ut res magis valeat quam pereat*. I discover no analogy between deeds and bills of exchange. Deeds are at the common law, they have their operation and their construction by the rules of the common law, they are contracts of a more solemn nature than other contracts; between particular parties, respecting particular interests, in particular subjects. Bills of exchange are instruments taking effect by the custom of merchants, intended to circulate visible property according to their apparent purport, entirely detached from, and independent of, all particular interests, particular subjects, and the private transactions between the original parties to the instrument. And I think I may fairly argue from the different nature of the instruments, that upon the very same general principles, which have disposed the common law of England to mould deeds by construction, so as to effectuate the intent of the parties, *ut res magis valeat quam pereat*, the law merchant must restrict bills of exchange to the precise mode of negotiation determined by the language of the bills themselves, without regard to any thing *dehors*. But let it be supposed, for the sake of the argument, that there may be some analogy between deeds and bills of exchange; I ask, What are the instances in which construction and interpretation have taken so great a liberty with deeds as to afford an argument by analogy, for construing in this case a bill drawn payable to order, to be a bill drawn payable to bearer? The instances which had occurred to me, as likely to be insisted upon, do, in my apprehension, afford no argument in support of this position. A deed of feoffment upon consideration without livery, may enure as a covenant to stand

much greater liability to error in statements of courses and distances, which are the result of reckoning or survey, than in

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seized to the use of the intended feoffee. A deed importing to be a grant by two, one having a present, the other a future interest, may enure as the grant of the former and the confirmation of the latter. A feoffment without livery operates nothing as a feoffment, is in truth no feoffment, but is a deed, which under circumstances may operate as a covenant to stand seized to uses. Why? The feoffor has, by the deed, agreed to transfer the seizin and his right in the subject to the feoffee. If the consideration is a money consideration, or a consideration of blood, which is more valuable than money, the law raises out of the contract an use in favor of the intended feoffee. The seizin which remains in the feoffor, because the deed is insufficient to pass it, must remain in him bound by the use. This is the effect of the feoffor's own agreement, plainly expressed upon the face of this deed. His agreement by his deed is in law a covenant, and by this simple process does his intended feoffment become, in construction of law, his covenant to stand seized to uses. It is a construction put upon the words of his deed, which *his words will bear*. So a deed, importing a grant of an interest by two, one entitled in possession, the other in reversion, is in consideration of law, the grant of the first, and the confirmation of the second. Why? The deed imports to be the grant of a present estate by both, and it is the apparent intent of both, that the grantee shall have the estate so granted; but the deed of the latter having no present interest to operate upon as a grant, nothing can pass by it as a grant. But this party has a future interest in the subject, out of which he may make good to the grantee the estate granted to him by the first grantor. This is to be done by a particular species of conveyance called a confirmation. The words which are used in this deed, in their strict technical sense, are words of confirmation as much as they are words of grant. In the mouth of this party the law says that they are words of confirmation, and shall enure as words of confirmation in order to give effect to his deed, *ut res magis valeat quam pereat*. Here again the construction which the law puts upon the words of the deed, is a construction *which the words will bear*. The words have several technical senses, of which this is one, and the law prefers this, because it carries into execution the clear intent of the parties, that the estate and interest conveyed by that deed shall pass. In both those cases we find words interpreted, not in their most general and obvious sense, it is true; but if they are interpreted in a manner which the *jus et norma loquendi* in conveyances will warrant, there is nothing of violence in such construction. Indeed, I do not know how it would be possible to read a single page of history in any language, without using the same latitude of construction and interpretation of words. To go one step beyond these instances; I venture to lay it down as a general rule respecting the interpretation of deeds, that all latitude of construction must

describing monuments, which are fixed facts. Thus, where, in a grant of land, the land was described as "beginning on the north line of the million acres, at a yellow birch tree, six miles east from the south-east corner," the birch tree being marked as a monument in the original survey of the land, and it appeared that the birch tree did not, in fact, stand in the north line, as supposed, but was so situated that a gore of land was left between it and the said north line; it was held that the birch tree and not the north line was to be taken as the boundary of the land granted.<sup>1</sup>

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submit to this restriction, namely, *that the words may bear the sense which, by construction, is put upon them*. If we step beyond this line, we no longer construe men's deeds, but make deeds for them." See, also, *Vere v. Lewis*, 3 T. R. 182.

<sup>1</sup> *Cleaveland v. Smith*, 2 Story, R. 279. In this case, Mr. Justice Story said: "It is with a view to ascertain the intention of the parties to deeds and grants, that courts of law, for the purpose of founding just presumptions of the intention, have adopted certain rules of interpretation, not as artificial rules, built upon mere theory, but as the true results of human experience. When, therefore, they have held it to be a general rule, in the interpretation of the descriptive words of deeds and grants, that courses, and distances, and ad-measurements, and ideal lines, should yield to known and fixed monuments, natural or artificial, upon the ground itself, they have but adopted the result of the common sense of mankind, because sources of mistake may more easily arise from the former than from the latter; and it is more likely, that men may commit an error in courses, or distances, or ad-measurements, or in references to ideal lines, such as those of surveys, than in monuments, and fixed and stationary objects, visible on the very land; and that in purchases and sales and bounties, the latter, as the best ordinary means of information, as well as of exclusive possession, are uppermost in their minds, and regulate their acts and intentions. Hence, a known spring, referred to as the corner of a boundary line, has always been deemed a more certain reference, in the understanding of the parties, than the ideal line of a survey of the land of another person, supposed to terminate at the same place. If they differ in point of location, the uniform rule is, that the spring governs as to the corner boundary, and not the survey. For the like reason, the plan of a survey, if it does not coincide with the actual monuments on the land, yields to the latter in point of certainty, and proof of intention. The same ground is equally true as to courses and distances from monument to monument. If they differ, the monuments govern, and not the courses or distances; or, in

§ 638. When the intent of the parties to a contract is manifestly paramount to the manner chosen to effect it, if it cannot operate in the mode intended, it may operate in such mode as will legally effect the intention. The difficulty, which this rule is intended to obviate, usually occurs in cases where some legal impediment prevents the contract from taking effect according to the particular mode by the parties. Thus, where a grant of land, by bargain and sale, was made by a father to a son, "to have and to hold after death of the grantor;" although it could not operate as a bargain and sale, because a freehold cannot, at common law, be made to commence *in futuro*, yet it was construed as a covenant to the father to stand seized to his own use during his life, and after his death to the use of his grantees and his heirs; and by this means, the evident intention of the father to give his son a full title, after his own decease, was effected.<sup>1</sup> So, also, deeds intended to operate as a lease and release, and which are void in that form, may be construed as a covenant to stand seized to uses, and be thereby rendered operative.<sup>2</sup>

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other words, measurements yield to monuments, because they are more open to mistake, and less carefully observed, or significantly marked." Newsome *v.* Pryor, 7 Wheat. R. 7; McIver's Lessee *v.* Walker, 9 Cranch, R. 173; Boardman *v.* Reed and Ford's Lessee, 6 Peters, R. 328; Doe & Smith *v.* Galloway, 5 Barn. & Adolph. 43; Frost *v.* Spaulding, 19 Pick. R. 445; Wendall *v.* The People, 8 Wend. R. 190; Conn. *v.* Penn, 1 Peters, C. C. R. 496; Magoun *v.* Lapham, 21 Pick. R. 135; Esmond *v.* Tarbox, 7 Greenl. R. 61; Machias *v.* Whitney, 16 Maine R. 343.

<sup>1</sup> Wallis *v.* Wallis, 4 Mass. 135; Doe *v.* Simpson, 2 Wils. 22; Doe *v.* Sal-keld, Willes, 672; Doe *v.* Whittingham, 4 Taunt. 20; Shep. Touch. 82, 83; Roe *v.* Tranmer, 2 Wils. 78. In this case, Willes, C. J. says, "Certainly it is more considerable to make the *intent* good in passing the estate, if by any legal means it may be done, than by considering the *manner* of passing it, to disappoint the intent and principal thing which was to pass the land." Osman *v.* Sheafe, 3 Lev. 370.

<sup>2</sup> Roe *v.* Tranmer, 2 Wils. 75; Shep. Touch. 82. See, also, Goodtitle *v.* Bailey, Cowp. 597; Hastings *v.* Blue Hill Turnpike, 9 Pick. 80; Vanhorn *v.* Harrison, 1 Dall. 137; Shove *v.* Pincke, 5 T. R. 124; Pray *v.* Pierce, 7 Mass. 381; Russell *v.* Coffin, 8 Pick. 143.

§ 639. Where the language of an instrument is neither uncertain nor ambiguous, it is to be expounded according to its apparent import; and is not to be warped from the ordinary meaning of its terms, in order to harmonize it with uncertain suppositions, in regard either to the probable intention of the parties contracting, or to the probable changes which they would have made in their contract, had they foreseen certain contingencies. Wherever the words are clear and definite, they must be understood according to their grammatical construction and in their ordinary meaning.<sup>1</sup> For

<sup>1</sup> 2 Evans's Pothier on Oblig. 37; Co. Litt. 147, a. Mr. Wigram, in his Treatise on the Interpretation of Wills, lays down, as a general principle of interpretation, the following propositions:—

“*Proposition I.* A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed.

“*Proposition II.* Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

“*Proposition III.* Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

“*Proposition IV.* Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words.

“*Proposition V.* For the purpose of determining the object of a testator's

such, it is natural to suppose, is the intention of the party using them. Thus, where a testator devised "my estate at Ashton," parol evidence was held to be inadmissible, to show, that he intended to pass not only his lands in Ashton, but also those in adjoining parishes, which he was accustomed to call his Ashton estate.<sup>1</sup> So, also, where an insurance was effected on fruit, and the policy contained the usual clause, that corn, fruit, &c., "are warranted free from average, unless general, or the ship be stranded," and the ship was stranded in the course of the voyage; the underwriters were held to be liable for an average loss arising from perils of the seas, though no part of the

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bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

"The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words."

"*Proposition VI.* Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, see Prop. VII.) will be void for uncertainty.

"*Proposition VII.* Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose.

"These cases may be thus defined:—where the object of a testator's bounty, or the subject of disposition, (that is, the person or thing intended,) is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

<sup>1</sup> Doe d. Oxenden v. Chichester, 1 Dow, P. C. 65; Miller v. Travers, 8 Bing. 244.

loss arose from the act of stranding; and Lord Kenyon said: "Without inquiring into the reasons for introducing this exception, on the grammatical construction of it I have no doubt." "If it had been intended, that the underwriters should only be answerable for the damage that arises in consequence of stranding, a small variation of expression would have removed all difficulty; they would have said, 'unless for losses arising from stranding.'"<sup>1</sup> The maxim applicable to cases coming within this class, is, "*Quoties in verba nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est. Divinatio non interpretatio est quæ omnino recedit a literâ.*"<sup>2</sup>

§ 640. The interpretation and construction of a contract should be favorable and liberal. Unless an agreement be manifestly intended to be frivolous or inconsistent, it should be so construed as to give it some effect; for the parties must be supposed to have intended something by their agreement. The maxim is, *Verba debent intelligi cum effectu, ut res magis valeat quam pereat.*<sup>3</sup> If words, therefore, be susceptible of two

<sup>1</sup> *Burnett v. Kensington*, 7 T. R. 222. In the subsequent case of *Aguilar v. Rodgers*, 7 T. R. 428, Lord Kenyon said: "The words here used are not equivocal, and we ought not to depart from them. It would be attended with great mischief and inconvenience, if, in construing contracts of this kind, we were not to decide according to the words used by the contracting parties. On the grammatical construction of the words, which is the safest rule to go by, I am of opinion," &c. See, also, *Gerrard v. Clifton*, 7 T. R. 676; *Mansell v. Burridge*, 7 T. R. 352; *Ware v. Hylton*, 3 Dall. R. 199; 2 Evans's *Pothier on Oblig.* 38, 39. See, also, *Vattel*, B. 2, Ch. 17, § 263. "It is not permitted to interpret what has no need of interpretation."

<sup>2</sup> *Co. Litt.* 147, a.

<sup>3</sup> See Wigram on *Interp. of Wills*, p. 42; Proposition II., ante, § 639, note. "Whenever," says Willes, J., in *Parkhurst v. Smith*, Willes, R. 332, "it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought if possible to put such a construction on the doubtful words of a deed, as will best answer the

different senses, they are so to be understood as to have a legal and actual operation; or if their ordinary and grammatical construction would render the contract frivolous and inoperative, when such was evidently not the intention of the parties, they should be construed according to their less obvious meaning.<sup>1</sup> So, also, where the language of a contract, if interpreted in its strict and primary sense, would conflict with the evident intention of the party using it,—as if it would be senseless in view of the circumstances of the case, or wholly inapplicable thereto,—it will be interpreted according to the secondary sense of the words used. Thus, if, in a will, the testator leaves a certain portion of his estate to his “child,” who would, according to the strict interpretation of the term, be his *legitimate offspring* only, or to his “son,” who is strictly his immediate descendant,—and it should appear that he had only an *illegitimate* child in the one case, or no immediate descendant, but only a grandson or an adopted child, in the other, the words of the will would be so construed as to harmonize with the facts of the case.<sup>2</sup> So, also, the particles

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intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit that though the intent of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them. But where the intent is plain and manifest, and the words doubtful and obscure, it is the duty of the judges (and this is that Astutia which is so much commended by Lord Hobart, p. 277, in the case of the Earl of Clanrickard) to endeavor to find out such a meaning in the words as will best answer the intent of the parties.” See, also, Gibson *v.* Minet, 1 H. Black. R. 569—614. Post, § 636 *a*, and note.

<sup>1</sup> “Where the words may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law; the intendment which standeth with law shall be taken.” Co. Litt. 42, *a, b*, 183, *a*; Parkhurst *v.* Smith, Willes, 332; Wright *v.* Cartwright, 1 Burr, 282; Fonblanche, Eq. B. 1, c. 6, § 13; Shep. Touch. 87, 88; Smith *v.* Packhurst, 3 Atk. 136; Robinson *v.* Hardcastle, 2 T. R. 254; Roe *v.* Tranmer, Willes, 682; Gray *v.* Clark, 11 Verm. R. 583; Patrick *v.* Grant, 14 Maine R. 233; Thrall *v.* Newell, 19 Verm. R. (4 Washb.) 202.

Wigram on the Interp. of Wills, p. 43; Wilkinson *v.* Adams, 1 Ves. & B.

"to," "from," and "until," which, if used in their ordinary sense, are exclusive of times and places to which they refer, may be so construed as to include such times and places, if an exclusive construction manifestly frustrate the intention of the parties.<sup>1</sup> Thus, where a lease was granted for twenty-one years *from* the day of the date, it was held that the phrase "from the day" was to be regarded as inclusive and not exclusive.<sup>2</sup> So if a note should begin "I promise," and be signed by an agent in this manner: "Pro A. B.—C. D." or "A. B., agent for C. D.;" it would be held to be the note of the principal.<sup>3</sup>

§ 640 a. This rule of liberal construction will be applied to all cases in which the contract would, if strictly construed, be illegal; for there is not only no presumption in law against the validity of a contract, but, on the contrary, every presumption is allowed in its favor.<sup>4</sup> But if the contract be ambigu-

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422; *Woodhouselie v. Dalrymple*, 2 Meriv. R. 419; *Beachcroft v. Beachcroft*, 1 Madd. R. 430; *Bayley v. Snelham*, 1 Sim. & Stu. 78; *Steede v. Berrier*, 1 Freem. R. 292, 477; *Gill v. Shelley*, cited *Wigram on Wills*, p. 44.

<sup>1</sup> *The King v. Stevens & Agnew*, 5 East, 254—260; *The King v. Skiplam*, 1 T. R. 490; *Wright v. Cartwright*, 1 Burr. 285; 3 Leon. 211; 1 Evans's *Pothier on Ob.* 92, and note b; *Story on Agency*, § 152.

<sup>2</sup> *Pugh v. Duke of Leeds*, Cowp. 725. In this case, Lord Mansfield said: "The ground of the opinion and judgment which I now deliver is, that '*from*' may in the vulgar use, and even in the strict propriety of language, mean either *inclusive* or *exclusive*: that the parties necessarily understood and used it in that sense which made their deed effectual: that courts of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them; more especially where the words themselves abstractedly may admit of either meaning."

<sup>3</sup> *Long v. Colburn*, 11 Mass. 97. See, also, *Emerson v. Prov. Hat Manuf. Co.* 12 Mass. 237; *Ballou v. Talbot*, 16 Mass. 461; *Hills v. Bannister*, 8 Cow. 31; *Story on Agency*, § 154.

<sup>4</sup> *Co. Litt. 42*; *Archibald v. Thomas*, 3 Cowen, 284; *Mills v. Wright*, 1 Freeman, 247; *Vernon v. Alsop*, T. Ray. 68; s. c. 1 Sid. 105; *Finch's Law*, 52; *Parkhurst v. Smith*, Willes, 332; *Pugh v. Duke of Leeds*, Cowp. 714; *Wright v. Cartwright*, 1 Burr. 285; *Ackland v. Lutley*, 1 P. & Dav. 636;

ously expressed, and be susceptible of different interpretations, and the party who is to do the act, be actually misled, and perform one act when a different act was intended by the other party, the contract will be construed in favor of the party making the mistake,—on the ground that the mistake was the consequence of the carelessness or negligence of the other party, and he, therefore, should suffer. Thus, where an agent is misled by the ambiguity in the orders of his principal, and adopts the wrong construction of them, he will be exonerated, if his act be *bona fide*.<sup>1</sup>

§ 640 b. A liberal interpretation is specially to be given to all commercial contracts. They are not to be construed strictly and technically, like bonds, which are generally technical in their form and drawn with caution, but all the facts and circumstances in the transaction which may be indicative of the intention of the parties are to be considered.<sup>2</sup> And this rule stands upon the manifest ground, that as these contracts are almost invariably drawn up loosely and informally, leaving much to inference, and often requiring a consideration of extrinsic circumstances to render them intelligible, a strict construction would frequently defeat the objects and intentions of the parties, and render them an unsafe basis for those extensive credits, by which the commerce of the world is carried on.

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Regina v. Ruscoe, 8 Adolph. & Ell. 386. Lord Lyndhurst, in Shore v. Wilson, 9 Clarke & Fin. 397, says: "The rule is this, and it is a fair and popular rule, that where a construction consistent with lawful conduct and lawful intention, can be placed upon the words and acts of parties, you are to do so, and not unnecessarily to put upon these words and acts a construction directly at variance with what the law prohibits or enjoins." See, also, Many v. Beekman Iron Co. 9 Paige, R. 188.

<sup>1</sup> Loraine v. Cartwright, 3 Wash. Circ. R. 151; Courcier v. Ritter, 4 Wash. Circ. R. 551; 1 Liv. on Agency, 403, 404; De Tastett v. Croussillat, 2 Wash. Circ. R. 132; Story on Agency, § 74.

<sup>2</sup> Bell v. Bruen, 1 Howard, R. 169; s. c. 17 Peters, R. 161; Lawrence v. McCalmont, 2 Howard, R. 426.

Contracts of guaranty, for instance, are always to be construed in this mode.<sup>1</sup>

§ 641. When the terms of a contract are doubtful and indefinite, they will be limited to the subject-matter of the contract, and to its obvious nature and object. *Verba generalia restringantur ad habilitatem rei vel aptitudinem personæ.*<sup>2</sup> Where, therefore, the contract is defective in its terms, or ambiguous, it will not be literally construed, but the law will supply whatever is necessary to effect the evident objects of the parties. Thus, where a policy of an insurance contained a stipulation, that a ship should "sail or depart with convoy," and the ship departed with convoy, and afterwards proceeded alone; it was held, that the stipulation was broken, and that convoy meant, "convoy for the voyage;" upon the ground, that the very object to be attained by such stipulation would be frustrated, unless she remained under convoy during the whole voyage. So, also, it is incumbent on the captain to comply with all the incidents of such a mode of sailing; such as obeying signals and taking sailing orders, for they, also, are requisitions flowing incidentally from the stipulation.<sup>3</sup> So, also, a trading license to certain British merchants to send a ship in ballast to an enemy's country, and there receive or load a cargo, and import it into Great Britain, legalizes a purchase and sale of the cargo.<sup>4</sup> So, also, the common covenant in a lease, for "uninterrupted and quiet enjoyment, without the hinderance and interruption of any persons whatsoever," is restricted to the evictions and disturbances of persons having lawful title, and

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<sup>1</sup> Ibid. See also *Mason v. Pritchard*, 12 East, R. 227; *Haigh v. Brooks*, 10 Adolph. & Ell. 309; *Mayer v. Isaac*, 6 Mees. & Welsb. 605.

<sup>2</sup> 1 Pow. on Cont. 377; *Doe v. Burt*, 1 T. R. 703.

<sup>3</sup> *Jefferyes v. Legendra*, 1 Show. 321; *Lilly v. Ewer*, 1 Doug. 72; *Webb v. Thomson*, 1 Bos. & Pul. 5; *Anderson v. Pitcher*, 2 Bos. & Pul. 164.

<sup>4</sup> *Fenton v. Pearson*, 15 East, 419.

does not extend to the trespasses of wrongdoers or to the public acts of government.<sup>1</sup>

§ 641 a. Again, general expressions used in a contract are controlled by the special provisions therein.<sup>2</sup> And where, by a written agreement, the defendant undertook to do certain work for the defendant in houses "in South and Southampton streets"—and it appeared, that, at the date of the agreement, the defendant had houses in South street, but not in Southampton street, it was held, that as the parties had in contemplation work to be done on the houses then owned by plaintiff, that the agreement should be restricted thereto.<sup>3</sup> The same rule applies to the construction of a mercantile guaranty. Wherever it is preceded by a recital definite its terms, and to which the general words obviously refer, the liability will be limited by the recital.<sup>4</sup>

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<sup>1</sup> *Chanudflower v. Prestley*, Yelv. 30, and cases there cited in note. See, also, generally, *Greenby v. Wilcocks*, 2 Johns. 1; *Dobson v. Crew*, Cro. Eliz. 705; *Penn v. Glover*, Moo. 402; s. c. Cro. Eliz. 421.

<sup>2</sup> *Chapin v. Clemitson*, 1 Barb. S. C. R. 311.

<sup>3</sup> *Hitchin v. Groom*, 5 Mann. Grang. & Scott, 515.

<sup>4</sup> *Bell v. Bruen*, 1 Howard, (U. S.) R. 168. In this case Mr. Justice Catron says: "Letters of guaranty are usually written by merchants; rarely with caution, and scarcely ever with precision; they refer in most cases, as in the present, to various circumstances, and extensive commercial dealings, in the briefest, and most casual manner, without any regard to form; leaving much to inference, and their meaning open to ascertainment from extrinsic circumstances, and facts accompanying the transaction: without referring to which they could rarely be properly understood by merchants, or by courts of justice. The attempt, therefore, to bring them to a standard of construction, founded on principles, neither known nor regarded by the writers, could not do otherwise than produce confusion. Such has been the consequence of the attempt to subject this description of commercial engagement to the same rules of interpretation applicable to bonds, and similar precise contracts. Of the fallacy of which attempt, the investigation of this cause has furnished a striking and instructive instance. These are considerations applicable to both of the arguments.

"The construction contended for as the true one on the part of the plain-

§ 642. So, also, the general sweeping clause in a deed will be limited to estates and things of the same nature and description as those previously mentioned. Thus, where a person having a paternal estate, which was under a settlement in Limerick, and two other estates in Mayo and Roscommon, made a voluntary settlement of the latter, describing them particularly in the deed, "together with all his other estates in the kingdom of Ireland;" it was held, that only the estates in Mayo and Roscommon passed.<sup>1</sup> Within this rule, also, is included that class of cases in which the masculine is held to include both sexes; and the indefinite is construed to be universal.<sup>2</sup> Thus, the term "men" has been held to include "women;"<sup>3</sup> the word "bucks" to include "does;" the word "horses" to include "mares."<sup>4</sup>

tiffs, is, that the letter of the defendant must be taken in the broadest sense which its language allows; thereby, to widen its application. To assert this as a general principle, would so often, and so surely, violate the intention of the guarantor, that it is rejected. We think the court should adopt the construction which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties. In the language of this court, in *Douglass v. Reynolds*, 7 Peters, 122, 'Every instrument of this sort ought to receive a fair and reasonable interpretation according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification or liberal construction, beyond the fair import of the terms.' Or, it is, 'to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety;' as declared in *Dick v. Lee*, 10 Peters, 493. The presumption is of course to be ascertained from the facts and circumstances accompanying the entire transaction. We hold these to be the proper rules of interpretation, applicable to the letter before us." See, also, *Lawrence v. McCalmont*, 2 Howard, (U. S.) R. 449. See post, § 866, 867.

<sup>1</sup> *Moore v. Magrath, Cowper*, 9.

<sup>2</sup> *Bro. Abr. Exposition des Termes*, 39; *Year-Book*, 19 Henry VI. 41; *Hetley*, 9; 1 Pow. on Cont. 400, et seq.; *Dennett v. Short*, 7 Greenl. 150; *Packard v. Hill*, 7 Cow. 434; *Hill v. Packard*, 5 Wend. 375; *State v. Dunnivant*, 3 Brevard, R. 9.

<sup>3</sup> *Bro. Abr. Exposition des Termes*, 39.

<sup>4</sup> *State v. Dunnivant*, 3 Brev. R. 9; *Packard v. Hill*, 7 Cowen, R. 434.

§ 643. So, where the words in a release are general, and unconnected with any recital, by which they may be limited, they must be taken most strongly against the releasor, and operate as a release of all claims. But if there be any recital of a particular claim, followed by general words of release, the general words will be qualified and restrained by the particular recital.<sup>1</sup> Thus, if a man receive £10, and give a receipt therefor, acquitting and releasing the debtor of that debt and of all other debts, actions, duties, and demands, nothing is released but the £10; because the last words must be limited by those foregoing.<sup>2</sup> So, also, where A. having a demand on an executor for a legacy of £50, and also another demand for £25, for her distributive part of her deceased sister's legacy, executed a release, in which, after reciting that she had received £25, as her distributive part of her sister's legacy, she acquitted and discharged the executor of all demands on him, in virtue of the will; it was held, that the release was to be limited in its operation to the particular sum recited, and that she was still entitled to her legacy of £50.<sup>3</sup> Where the release is general,

<sup>1</sup> Bacon, Abr. Release, K.; 1 Pow. on Cont. 370, et seq.; 1 Domat, 38, § 21; Hesse *v.* Stevenson, 3 B. & P. 565; Platt on Cov. 379; Barton *v.* Fitzgerald, 15 East, 530; Nind *v.* Marshall, 3 Moore, 703. Even words struck out of an instrument may be taken in view, to show that if the construction contended for had been intended, they would not have been erased. Strickland *v.* Maxwell, 2 Cromp. & Mees. 539; Doe d. Raikes *v.* Anderson, 1 Stark. R. 155. See also Coddington *v.* Davis, 3 Denio, R. 17; Chapin *v.* Clemitson, 1 Barbour, S. C. R. 311.

<sup>2</sup> 2 Roll. Abr. 409. Lord Holt is said to have denied this doctrine in the case of Knight *v.* Cole, 1 Show. 155; but Lord Ellenborough affirmed it in Payler *v.* Homershamb, 4 Maule & Selw. 427; and said he "was sorry to find it had been denied as law, because it seemed to him as sound a case as could be stated." It is the settled law undoubtedly of England and of this country. Bac. Abr. Release, K.; Cole *v.* Knight, 3 Mod. 277; Abree's case, Hetl. 15; Payler *v.* Homershamb, 4 Maule & Selw. 423; Lampon *v.* Corke, 5 Barn. & Ald. 606; Lyman *v.* Clarke, 9 Mass. 235; Munro *v.* Alaire, 2 Caines, 329; Wilkes *v.* Ferris, 5 Johns. 345.

<sup>3</sup> Lyman *v.* Clarke, 9 Mass. 235.

however, extrinsic evidence is not admissible to restrict it; <sup>1</sup> though it would be otherwise in the case of a receipt.<sup>2</sup>

§ 644. So, also, the recital of a bond will ordinarily limit the condition; for the condition must be connected with and restrained by the subject-matter of the recital.<sup>3</sup> Thus, where one Jenkins was appointed a deputy-postmaster, for the term of six months, and a bond was given by the defendant, the condition of which was, that if "the said Jenkins should, for and during all the time that he should continue deputy-postmaster, faithfully execute and perform all the duties belonging to the said office, then this obligation to be void," and the breach assigned was subsequent to the six months; it was held, that the condition could only refer to the recital, by which the defendant was not to be responsible for Jenkins for a longer time than six months.<sup>4</sup> So, also, where the condition of a bond recited that the defendant had agreed with the plaintiffs to collect their revenues, from time to time, for twelve months, and afterwards stipulated that "he would justly account and obey orders, &c., at all times thereafter, during the continuance of such his employment, and for so long as he should continue to be employed;" the condition was held to

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<sup>1</sup> Thorpe *v.* Thorpe, 1 Ld. Raym. 235; Bac. Abr. Release, K.; Butcher *v.* Butcher, 1 B. & P. New R. 113; Pierson *v.* Hooker, 3 Johns. 68; Greenleaf on Evidence.

<sup>2</sup> 3 Stark. Ev. 1044, 1272; Putnam *v.* Lewis, 8 Johns. 389; Johnson *v.* Weed, 9 Johns. 310; Ensign *v.* Webster, 1 Johns. Cas. 145; Stackpole *v.* Arnold, 11 Mass. 32; Walker *v.* McCulloch, 4 Greenl. 427.

<sup>3</sup> Per Eyre, J. Gilb. Cas. 240.

<sup>4</sup> Pearsall *v.* Summersett, 4 Taunt. 593. See, also, Lord Arlington *v.* Mericke, 2 Saund. 411, note by serg. Williams; Stoughton *v.* Day, Style, 18; s. c. Aleyn, 10; Bell *c.* Bruen, 17 Peters, C. C. R. 169; Weston *v.* Mason, 3 Burr. 1727; Liverpool Waterworks *v.* Atkinson, 6 East, 507; St. Saviour's *v.* Bo-stock, 2 New R. 175; Hassell *c.* Long, 2 Maule & Selw. 363; Bigelow *v.* Bridge, 8 Mass. 275; U. States *v.* Kirkpatrick, 9 Wheat. 720; Commonwealth *v.* Fairfax, 4 Hen. & Munf. 208; Commonwealth *v.* Baynton, 4 Dallas, 282; South Carolina Soc. *c.* Johnson, 1 McCord, 41; S. Car. Ins. Co. *v.* Smith, 2 Hill, 589.

be limited to the period of twelve months, mentioned in the recital.<sup>1</sup>

§ 645. So, also, the responsibility of the obligor and sureties on a bond will be restricted to breaches in respect to the particular obligees named. As, where a bond was given, conditioned, "that one W. B. should, during the time that he should continue in the service of the plaintiff, as a broad clerk, keep just and true accounts of all moneys received," and the plaintiff afterwards entered into partnership with another, and the breach assigned, was in respect to the partnership; it was held, that the obligor and sureties were not responsible; because the breach complained of was in respect to the partnership, and not of the plaintiff.<sup>2</sup> But if the security be given to the firm or house, and not to particular persons composing it, a change of partners will make no difference in the responsibility of the obligor and sureties, so long as the house or firm is nominally the same;<sup>3</sup> and this rule governs upon the ground, that the giving a security to a *house*, manifests an intention on the part of the guarantors, to provide that the guaranty should continue, although the partners should change.<sup>4</sup>

§ 646. Yet, if the condition be manifestly intended to extend to matters not set forth in the recital, it will not be limited thereby; for such an interpretation would set at naught the intentions of the parties. Thus, where the condition of a bond, after setting forth certain matters, contained a stipula-

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<sup>1</sup> Liverpool Waterworks *v.* Atkinson, 6 East, 510, and note; Moore *v.* Magrath, Cowl. 9.

<sup>2</sup> Wright *v.* Russell, 3 Wils. 530.

<sup>3</sup> Bartlett d. Bowdage *v.* Attorney-General, Parker, R. 277, 278; Miller *v.* Stewart, 9 Wheat. 681; Boston Hat Manufactory *v.* Messinger, 2 Pick. 223. See, also, Dedham Bank *v.* Chickering, 4 Pick. 314; Fell on Guaranties, ch. 5.

<sup>4</sup> Barclay *v.* Lucas, 1 T. R. 291, note a; Metcalf *v.* Bruin, 12 East, 400; Miller *v.* Stewart, 9 Wheat. 681.

tion for indemnity against all claims arising in reference thereto, or "any other account thereafter to subsist" between the parties: it was held, that the liability of the obligor was not limited to the matters recited.<sup>1</sup> So, also, the same rule applies to guaranties and letters of credit. Thus, where a letter of credit recited as follows: "Our mutual friend, W. H. Thorn, has informed me that he has a credit for two thousand pounds, given by you in his favor, &c.;" and then went on to say, "you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty;" it was held that the guaranty was general, and extended to all accounts in favor of the principal.<sup>2</sup>

§ 647. The terms of a contract are ordinarily to be interpreted according to their popular and usual meaning, rather than according to their exact definition. Yet, since this rule would often fail to give effect to the real intention of the parties, it is modified so as to meet those cases, wherein technical words or phrases, to which custom or science has affixed a peculiar signification, have been employed by the parties in their secondary meaning.<sup>3</sup> Thus, the terms of mercantile contracts are to be understood in the sense which they have acquired from mercantile usage; because, if there be any such usage, it affords a presumption, that the parties had it in view when their contract was made. Thus, the terms, "fur,"<sup>4</sup> "freight,"<sup>5</sup> "thousand,"<sup>6</sup> "cotton in bales,"<sup>7</sup> "roots,"<sup>8</sup> "sea-

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<sup>1</sup> *Sansom v. Bell*, 2 Camp. 39; *S. P. Com. Dig. Parol*, A. 19; *Watson v. Boylston*, 5 Mass. 411.

<sup>2</sup> *Bell v. Bruen*, 17 Peters, R. 161.

<sup>3</sup> *Robertson v. French*, 4 East, R. 135.

<sup>4</sup> *Astor v. The Union Insurance Co.* 7 Cow. 202.

<sup>5</sup> *Peisch v. Dickson*, 1 Mason, 11, 12.

<sup>6</sup> *Smith v. Wilson*, 3 B. & Ad. 728.

<sup>7</sup> *Taylor v. Briggs*, 2 Car. & P. 525.

<sup>8</sup> *Coit v. Commercial Ins. Co.* 7 Johns. R. 385.

letter,"<sup>1</sup> "level,"<sup>2</sup> "a pack of wool," as well as the meaning of the phrase "duly honored," when applied to a bill of exchange,<sup>3</sup> have been interpreted by usage and custom, so as to receive a peculiar construction, differing from their ordinary meaning.<sup>4</sup> So, also, evidence has been admitted to show that by mercantile usage "mess pork of Scott & Co." meant pork manufactured by Scott & Co.;<sup>5</sup> that "rice" is not considered as corn;<sup>6</sup> and that "provisions" were included in a policy of insurance under the name "furniture."<sup>7</sup>

§ 648. So, also, the terms in a policy of insurance are to be construed according to the technical meaning which they have acquired by usage; for, otherwise, they would be absurd and contradictory. But unless they are technical, they come within the general rule.<sup>8</sup>

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<sup>1</sup> Sleight *v.* Hartshorne, 2 Johns. R. 531.

<sup>2</sup> Clayton *v.* Gregson, 5 Adolph. & Ell. 302.

<sup>3</sup> Chaurand *v.* Angerstein, Peake's Cas. 43. See, also, Peisch *v.* Dickson, 1 Mason, 11, 12; Doe *v.* Benson, 4 B. & Ald. 588; U. S. *v.* Breed, 1 Sumner, 159; Taylor *v.* Briggs, 2 Car. & P. 525; Lucas *v.* Groning, 7 Taunt. 164; Macbeith *v.* Haldimand, 1 T. R. 172; Neilson *v.* Hanford, 8 Mees. & Welsb. 806; Morrell *v.* Frith, 3 Mees. & Welsb. 402.

<sup>4</sup> See, also, Story on Agency, 62, and note; Ibid. § 74, and note; Hogg *v.* Snaith, 1 Taunt 347; Ekins *v.* Macklish, Ambler, 184, 185; Murray *v.* East India Co. 5 B. & Ald. 204-210; Lucas *v.* Groning, 7 Taunt. 167; Morrill *v.* Frith, 3 Mees. & Welsb. 406; Mechanics Bank *v.* Bank of Columbia, 5 Wheat. 326. See, also, Hone *v.* Mutual Ins. Co. 1 Sandf. S. C. R. 137; Eaton *v.* Smith, 20 Pick. R. 150.

<sup>5</sup> Powell *v.* Horton, 2 Bing. N. C. 668.

<sup>6</sup> Scott *v.* Bourdillion, 2 Bos. & Pul. N. R. 213.

<sup>7</sup> Brough *v.* Whitmore, 4 T. R. 206.

<sup>8</sup> Robertson *v.* French, 4 East, 135. In this case Lord Ellenborough said: "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases: it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, namely, that it is to be construed according to

§ 648 *a.* Where words which are technical or mercantile, belonging to any art, trade, course of dealing, or class of

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its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance, and other instruments in this respect, is, that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words super-added in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects." See, also, *Child v. Sun Mut. Ins. Co.* 3 Sandf. 26; *Whitmore v. Coats*, 14 Missouri, 9; *Evans v. Pratt*, 3 Man. & Gr. 759; *Vail v. Rice*, 1 Seldon, 155; *Barton v. McKelway*, 2 Zabriskie, N.J. 174; *Macy v. Whaling Ins. Co.* 9 Met. 354. In *Hutton v. Warren*, 1 Mees. & Welsb. 475, Parke, B. said: "It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied, where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have been so long regulated upon the supposition that all customary obligations, not altered by the contract, are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed." And in *Brough v. Whitmore*, 4 T. R. 210, Lord

people, are introduced into a contract, their peculiar meaning is a question of fact to be determined by a jury and to be gathered from experts; but their meaning being determined, their legal bearing is a matter of law for the court to decide.<sup>1</sup> Thus,

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Kenyon said : "I remember it was said many years ago, that if Lombard street had not given a construction to policies of insurance, a declaration on a policy would have been bad, on general demurrer, but the uniform practice of merchants and underwriters had rendered them intelligible." See, also, Johnson v. Johnson, 3 Bos. & Pul. 167, 168. See, also, Story on Agency, 62, and note; Ibid. § 74, and note; Hogg v. Snaith, 1 Taunt. 347; Ekins v. Macklish, Ambler, 184, 185; Murray v. East India Co. 5 B. & Ald. 204, 210; Lucas v. Groning, 7 Taunt. 167; Morrell v. Frith, 3 Mees. & Welsb. 406; Mechanics Bank v. Bank of Columbia, 5 Wheat. 326.

<sup>1</sup> In Neilson v. Bowker, 8 Mees. & Welsb. 806, Baron Parke said: "The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury: and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the Court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all effectually." Mr. Justice Shaw in Eaton v. Smith, 20 Pick. R. 150, lays down the rule thus: "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage, to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be, to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word, modified or explained by the usage. But when no new word is used, or when an old word, having an established place in the language, is not apparently used in any new, technical, or peculiar sense, it is the province of the court to put a construction upon the written contracts and agreements of parties, according to the established use of language, as applied to the subject-matter, and modified by the whole instrument, or by existing circumstances." See, also, Parmiter v. Coupand, 6 Mees. & Welsb. 108; Pierce v. The State, 13 New Hamp. 536-562; Morrell v. Frith, 3 Mees.

where an offer was made by letter, to sell a quantity of "good barley," and the letter of reply referring to the offer, said, "which offer we accept, expecting you will give us *fine* barley, and good weight," it was held, that the contract was to be construed according to the mercantile meaning of the term, and whether it had such a peculiar meaning in the trade was properly a question for the jury to determine; but whether there was a complete acceptance of the offer was a question for the court. Where, however, meaning of the words as words is clear, the construction of the contract is for the court solely.<sup>1</sup>

§ 649. The proper office of a *usage* or *custom* is not to contradict the terms of a contract, but to afford an interpretation and explanation of the otherwise indeterminate intentions of the parties. In the interpretation of a contract, the usage or custom of trade may be resorted to, not only to explain the meaning of terms, to which a peculiar and technical meaning is thereby affixed, but also to supply evidence of the intentions of the party in respect to matters, with regard to which the contract itself affords a doubtful indication, or perhaps no indication at all.<sup>2</sup> Thus, evidence of usage was held to be admissible to show that the term "days" in a bill of lading meant "working days;"<sup>3</sup> and that a contract to pay a certain sum "per day" for labor and services was an agreement

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& Welsb. 402; Perth Amboy Manuf. Co. v. Condit, 1 N. Jer. 659; Wason v. Rowe, 16 Verm. R. 525.

<sup>1</sup> Morrell v. Frith, 3 Mees. & Welsb. 404. Baron Parke said: "The construction of a doubtful instrument itself is not for the jury, although the facts by which it may be explained are." In this case the case of Lloyd v. Maund, 2 T. R. 760, in which a contrary rule was laid down, is said not to be law. See, also, Edwards v. Goldsmith, 16 Penn. R. 43; Bomeisler v. Dobson, 5 Whart. R. 398.

<sup>2</sup> Hutton v. Warren, 1 Mees. & Welsb. 475.

<sup>3</sup> Cochran v. Retberg, 3 Esp. N. P. C. 121.

to pay such sum for every ten hours' work.<sup>1</sup> So, where a pauper and other persons agreed in writing to "serve B. & Co." for a certain length of time and for certain prices, and "to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants," and on trial it appeared, that the pauper had occasionally absented himself on holidays during the year, it was held, that the custom of persons employed in the particular trade, under contracts like that of the pauper, to have certain holidays in the year, might properly be inquired into to define the exact terms of the particular contract.<sup>2</sup> So, where bought and sold notes are given on a sale of goods, in an action for the price, it may be shown that by usage of trade all sales of that specific article are by sample, although not so expressed in the notes.<sup>3</sup> So, also, where, in a charter-party, the charterer engaged that the vessel should be unloaded at a certain average rate per day, and that, if detained for a longer period, he would "pay for such detention at the rate of £5 per diem, to reckon from the time of the vessel being ready to unload, and *in turn to deliver*," it was held, that evidence was admissible to show that by usage of trade the words "*in turn to deliver*," had a peculiar meaning.<sup>4</sup> So, also, where it appeared, that by the usage of the banks at Washington, four days' grace were allowed on bills and promissory notes, it was held that demand and notice given in accordance with such usage would bind the indorser,—on the ground that where bills and notes are made payable at a certain bank, it is presumed that the parties intend that demand and notice shall be given according to the usage of such bank.<sup>5</sup>

<sup>1</sup> Hinton v. Locke, 5 Hill, R. 437.

<sup>2</sup> The Queen v. Inhab. of Trent, 5 Adolph. & Ell. (N. S.) 303.

<sup>3</sup> Syers v. Jonas, 2 Exch. R. 111.

<sup>4</sup> Robertson v. Jackson, 2 Mann. & Grang. (N. S.) 413.

<sup>5</sup> Mills v. Bank of U. S. 11 Wheat. R. 431, and also Renner v. Bank of Columbia, 9 Wheat. R. 581; Bank of Washington v. Triplett, 1 Peters, R. 25; Chicopee Bank v. Eager, 9 Metcalf, R. 583.

§ 649 *a.* Usage, therefore, is admissible for the purpose of determining the real intentions and understanding of the parties, where they are not determined by the actual terms of the contract. But inasmuch as the actual terms employed in a written contract afford the most certain and determinate evidence of the intentions of the parties, usage is not admissible to contradict or supersede the positive and definite provisions secured thereby, but only to explain whatever is indeterminate in their expression.<sup>1</sup> And much caution is observed by the courts in allowing evidence of usages which do not agree with the apparent provisions of the contract.<sup>2</sup> When therefore it was attempted to establish a custom that the owners of packet vessels between New York and Boston should be liable only for damage occasioned by their own neglect, it was held that this was not admissible to vary the terms of a bill of lading by which goods were to be delivered in good order and condition, "the dangers of the seas only excepted."<sup>3</sup> Besides,

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<sup>1</sup> *None v. Mutual Safety Ins. Co.* 1 Sand. S. C. R. 137.

<sup>2</sup> *Schooner Reeside*, 2 Sumner, R. 567.

<sup>3</sup> *Schooner Reeside*, 2 Sumner, R. 567. In this case Mr. Justice Story, in delivering judgment, said: "I own myself no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses to outweigh the well-known and well-settled principles of law. And I rejoice to find, that, of late years, the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or

the presumption is, that when the terms of a contract are reduced to writing, and are inconsistent with the usage, the parties agree to waive the usage.<sup>1</sup>

§ 650. Nor is it every usage that is admissible even to explain a contract. For if it be to do an illegal act, or if it violate the express requirements of a statute, or defeat the essential provisions of the contract, it cannot be given in evidence. Thus, a usage among banks in Massachusetts to regard a certain bank post-note, payable at a future day cer-

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words have various senses, some common, some qualified, and some technical, according to the subject-matter, to which they are applied. But I apprehend, that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *à fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control, a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties.

"Now, what is the object of the present asserted usage or custom? It is to show, that, notwithstanding there is a written contract, (the bill of lading,) by which the owners have agreed to deliver the goods, shipped in good order and condition, at Boston, the danger of the seas only excepted; yet the owners are not to be held bound to deliver them in good order and condition, although the danger of the seas has not caused or occasioned their being in bad condition, but causes wholly foreign to such a peril. In short, the object is, to substitute for the express terms of the bill of lading an implied agreement on the part of the owners, that they shall not be bound to deliver the goods in good order or condition; but that they shall be liable only for damage done to the goods occasioned by their own neglect. It appears to me, that this is to supersede the positive agreement of the parties; and not to construe it. The exception must, therefore, be sustained."

<sup>1</sup> Schooner Reeside, 2 Sumner, 567; 3 Kent, Comm. 260; Rogers *v.* Mechanics Ins. Co. 1 Story, 607.

tain, as payable without grace, there being no express stipulation to that effect in the note itself, would not be admissible to explain the contract, because it is contrary to the Revised Statutes of Massachusetts, providing that on all promissory notes, payable at a future day certain, grace shall be allowed, unless there be an express stipulation to the contrary.<sup>1</sup> But where the usage is not immoral or illegal in itself, the mere fact that it is in contravention of the general rules of the common law, will not render it inadmissible, provided it appear to be reasonable and convenient. Thus, it has been held, that where a certain cargo of corn was sold in bulk under a warranty, it was held that evidence was admissible to show a usage in the place where it was sold, that the purchaser could keep as much of the corn as answered the warranty and decline taking the residue—although the general rule of law required him, if he would rescind the sale, to restore the entire quantity.<sup>2</sup>

§ 650 a. It must also appear that the usage is reasonable or it will not be admitted in explanation of the contract.

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<sup>1</sup> *Perkins v. Franklin Bank*, 21 Pick. R. 483. See, also, to this point, *Merchants Bank v. Woodruff*, 6 Hill, R. 174.

<sup>2</sup> *Clark v. Baker*, 11 Metcalf, R. 189. Mr. Justice Dewey said: "In the present case, the usage found by the jury goes directly to establish a rule in contravention of the rules of the common law, in relation to rescinding a contract in a case of sale of an unsound article, accompanied by a warranty, or induced by false representations. The general rule of law requires the vendee, if he would rescind the sale for such cause, to restore the entire commodity purchased. The local usage proved is, that in a sale of corn under like circumstances, the party may keep so much of the commodity as answers the warranty or representation, and decline taking the residue; that is, he may rescind the contract in part, and, without returning the corn he has received, may recover back the money paid for so much of the article as does not answer the representation. This usage is certainly not an unreasonable one, and not to be rejected upon that ground. The nature of the commodity, the manner of exposing the article for sale, the price being fixed by the bushel, and the mode of delivery, all alike point out this as a reasonable and

Thus a usage among owners of vessels engaged in the whaling trade to accept all bills of their masters drawn on them for supplies furnished abroad, was held to be of so unreasonable a character, that the owners would not be governed thereby, even were the usage proved to exist.<sup>1</sup>

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convenient usage. We understand the contract to have been an oral one. Such being the case, the admission of the evidence of the usage is not objectionable upon the ground of its being offered to control, vary, or contradict a contract in writing. Nor does the usage contradict any express oral contract made by the parties. Had it done either, it would have presented a very different question.

"Usages of this character are only admissible upon the hypothesis that the parties have contracted in reference to them. If the parties make express stipulations as to the terms of a sale, or the manner of a contract, or state the conditions upon which it may be rescinded, such express stipulations must be taken as the terms of the contract, and they are not to be affected by any usage contrary to them.

"Looking at the usage relied upon in the present case, and taking it to have been found by the jury to be well established by the proof, as a general usage of the dealers in similar commodities in Boston, and finding the same is not repugnant to any express stipulation in the contract of the parties; without any disposition on the part of the court to extend the doctrine of local usages beyond the adjudicated cases, yet we have not felt authorized to reject the evidence offered in the present case."

<sup>1</sup> *Bowen v. Stoddard*, 10 Metcalf, R. 380. Hubbard, J., said in this case: "There was an attempt at the trial to prove that it was the usage among the merchants of New Bedford and Fairhaven, engaged in the whaling trade, to accept the bills of their masters drawn for supplies furnished abroad. But the evidence fell short of establishing it. The proof reached no further than this; that there was such confidence subsisting between the owners and masters, that bills drawn on the owners for supplies are generally accepted; but that the owners claim the right to refuse them, if from any cause they doubt the integrity of the master in the application of the funds received by him. The practice, it is said, has hitherto been found convenient; but this convenience results from the integrity of the masters, and the honorable character of the owners. Still, if it were more clearly established as a usage, yet it is not such a one as can charge the owners as acceptors; for a usage, to be legal, must be reasonable as well as convenient; and that usage cannot be reasonable, which puts at hazard the property of the owners at the pleasure of the

§ 650 b. Again, the usage must not be narrow, local, and confined; nor must it be the private opinion of a few; but it must be so uniform and notorious, and of such long standing as to afford a presumption that the parties contemplated it as a part of their contract.<sup>1</sup> Thus, the usage or custom of a particular port, in respect to a particular trade, is not a sufficient custom to limit the terms of a contract of insurance; but it must be some known or general custom in the trade, applicable to all ports of the State wherein it exists.<sup>2</sup> So, also, proof that a particular mode of selling cotton in Mobile "was very common in the trade, but that a few factors in Mobile would not do so," was held not to be proof of a usage of trade.<sup>3</sup>

§ 651. If, however, the parties to a contract have previously dealt together in a certain manner, following a particular usage or custom, such usage may be given in evidence to interpret their intentions and understanding, although it be confined to them individually.<sup>4</sup> Thus, where the usage of a

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master, by making them responsible as acceptors on bills drawn by him, and which have been negotiated on the assumption that the funds were needed for supplies or repairs; and no evil can flow from rejecting such a usage; because owners, who have confidence in the judgment and discretion, as well as integrity of their shipmasters, can give them, at their pleasure, a limited authority to draw, which will furnish them with credit, and protect them from imposition." See, also, *Jordan v. Meredith*, 3 Yeates, R. 318.

<sup>1</sup> *Cunningham v. Fonblanque*, 6 Car. & Payne, 44; *Hall v. Benson*, 7 Car. & Payne, 711; *Atkins v. Howe*, 18 Pick. R. 16; *Singleton v. Hilliard*, 1 Strob. S. C. R. 203. See *Cope v. Dodd*, 13 Penn. St. Rep. 33; *United States v. Buchanan*, 8 How. R. 83.

<sup>2</sup> *Rogers v. Mechanics Ins. Co.* 1 Story, 606; *Renner v. Bank of Columbia*, 9 Wheat. 551; *Taunton Copper Co. v. Merchants Ins. Co.*, 22 Pick. R. 108; *Child v. Sun Mutual Ins. Co.*, 3 Sandf. R. 26.

<sup>3</sup> *Austill v. Crawford*, 7 Alab. R. 335.

<sup>4</sup> *Loring v. Gurney*, 5 Pick. R. 15; *The Bridgeport Bank v. Dyer*, 19 Conn. R. 136; *Bodfish v. Fox*, 23 Maine (10 Shepley), R. 90; *Bourne v. Gatliff*, 11 Clark & Fin. 45-70.

bank, not to transmit checks by mail, but by a certain steam-boat, was well known to a party drawing a check, it was held, that he must be supposed to have made such a usage a part of any arrangement with the bank in respect to the transmission of the check; as no express agreement to the contrary appeared.<sup>1</sup>

§ 652. If, however, the terms employed in a contract be inconsistent with the construction which custom or usage require, they must be understood in the sense in which they were obviously employed.<sup>2</sup> So, also, if plain and ordinary terms and expressions be used, to which no local nor technical and peculiar meaning is attached, they cannot be altered by evidence of a mercantile usage. For though usage may be admitted to elucidate what is doubtful, it is not admissible to contradict what is plain.<sup>3</sup> Thus, where a policy of insurance was, by its terms, to continue on a ship, until she was "moored twenty-four hours, and on the goods till safely landed;" it was held, that evidence of the usage, that the risk on the goods, as well as on the ship, expired in twenty-four hours, was inadmissible.<sup>4</sup> So, also, where words have a known legal meaning, as the technical words in a deed, they cannot be varied by usage,<sup>5</sup> unless such usage be specially

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<sup>1</sup> Bridgeport Bank *v.* Dyer, 19 Conn. R. 136.

<sup>2</sup> 3 Stark. Ev. 1036; 2 Stark. Ev. 452, et seq.; Dickinson *v.* Lilwall, 4 Camp. 279; Gibbon *v.* Young, 8 Taunt. 260; Lewis *v.* Thatcher, 15 Mass. 433; Webb *v.* Plummer, 2 B. & Ald. 746; 2 Phil. Ev. 45, 46; Hotham *v.* East India Co. 1 T. R. 638.

<sup>3</sup> Blackett *v.* Royal Exchange Assurance Co. 2 Cromp. & Jerv. 249, per

• Lord Lyndhurst; 3 Stark. Ev. 1036; Hawes *v.* Smith, 3 Fairf. 429; 2 Stark. Ev. 566; Greenl. Ev. § 280, 295.

<sup>4</sup> Parkinson *v.* Collier, Park on Ins. 47; Yeats *v.* Pim, 2 Marsh. Rep. 141; Greenl. Ev. § 292; Blackett *v.* Royal Ex. Ass. Co. 2 Cromp. & Jerv. 244, 249, 250.

<sup>5</sup> 2 Stark. Ev. 527; Doe *v.* Benson, 4 B. & Ald. 588; Frith *v.* Barker, 2 Johns. 327; Sleight *v.* Rhinelander, 1 Johns. 192; Thompson *v.* Ashton, 14

referred to in the contract itself; or unless the words be explained in the contract so as to conform to the usage.<sup>1</sup> Thus, where a demise was made of lands, to be held from the Feast of St. Michael, which must be taken, legally, to mean from New Michaelmas; it was held, that evidence of usage and custom could not be introduced to show, that Old Michaelmas was intended.<sup>2</sup> But such evidence would be admissible on a mere letting by parol.<sup>3</sup>

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Johns. 316; *Stoever v. Whitman*, 6 Binn. 417; *Henry v. Risk*, 1 Dall. 265; *Homer v. Dorr*, 10 Mass. 26.

<sup>1</sup> *Ellmaker v. Ellmaker*, 4 Watts, 89; *Brackett v. Leighton*, 7 Greenl. 385; *Doe v. Lea*, 11 East, 312.

<sup>2</sup> *Doe v. Lea*, 11 East, 313; 2 Stark. Ev. 455; 3 Stark. Ev. 1038; *Sleight v. Rhinelander*, 1 Johns. 192.

<sup>3</sup> *Doe v. Benton*, 4 Barn. & Ald. 588. In *Hone v. The Mutual Safety Co.* 1 Sandford, S. C. R. 138, the question as to when evidence of usage is admissible was carefully considered; and the court in this case said, "It is one of the most embarrassing subjects with which we meet, to determine when and for what purposes evidence of a usage shall be received; and we can add our testimony to that of Judge Story, in the case of the Schooner Reeside, 2 Sumner, 567, as to the frequency of the attempts to construe and influence contracts by proof of usage.

" We have endeavored, by a careful consideration of the principles of law, and the adjudications on the subject, to ascertain the true ground upon which this usage must be admitted or rejected.

" We find it clearly settled, that a general usage, the effect of which is to control rules of law, is inadmissible. So of one which contradicts a settled rule of commercial law. In the application of this principle, in one instance, the usage rejected was to the effect, that a bill or note payable to order, and indorsed specially, without adding the words, or order or bearer, ceased to be negotiable. *Edie v. East India Co.* 2 Burr. 1216. In another case, the universal usage in Boston was proved to be, that when a cargo was insured for a voyage out and proceeds home, and the proceeds were not returned, a portion of the premium was refunded to the insured; but the court refused to receive the usage to reduce the recovery on premium notes given upon such an insurance. *Homer v. Dorr*, 10 Mass. 26.

" In *Frith v. Barker*, 2 Johns. 327, a master of a ship claimed to recover freight on fifty hogsheads of sugar, from which, owing to the leakage of the vessel, the sugar washed out during the voyage, and the casks were empty on

§ 653. It is also a general rule, that a contract is to be expounded according to the law or custom of the place where

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their arrival in this port. The master offered to prove that, by the usage of merchants at New York, freight was payable for the empty casks under such circumstances ; and the court held it was not competent.

“ On the other hand, there is a great variety of cases in which the courts have permitted evidence to be given, to show the meaning of terms in commerce and the arts, or of words and phrases peculiar to mercantile pursuits. This is generally spoken of as proof of *usage*; although in many cases it is rather the definition of technical language. Thus, without citing the cases at large, we will refer to the following instances, as illustrating the principle upon which they proceed. ‘Roots’ were proved not to include sarsaparilla, in the clause relative to average in a marine policy, the insurance being on sarsaparilla; the term ‘skins,’ in a like instance, does not include bear-skins having the fur on them; the word ‘outfits,’ in policies on whaling vessels, includes one fourth of the catchings, the catchings becoming virtually the proceeds of a large portion of the outfits, and the like. So proof has been allowed of the meaning of the term ‘sea letter,’ in policies at a particular port; the meaning of the word ‘cargo,’ in particular voyages and lines of trade; the customs of a particular trade in respect of convoy, the mode of unlading goods at the port of destination, the period of detention allowable at intermediate ports for landing parts of a cargo, the meaning of ‘proceeds of goods shipped,’ and the like.

“ But when an attempt was made to prove that, by the usage, a boat lost from the stern davits was not to be paid for under a policy on a ship, her tackle, &c., or that a boat slung upon the quarter, was not covered by such a policy, the Supreme Court of Massachusetts, and the Court of Exchequer in England, in contemporary decisions, rejected the evidence.

“ In *Rankin v. The American Insurance Company*, 1 Hall, R. 619, the defendants offered to prove in bar of a recovery on a policy on merchandise, that by the usage of trade in this port, it was indispensable to charge the indemnitors for goods imported, that an actual survey should be made on board by the port-wardens, finding that the goods were properly stowed and were damaged on the voyage, by the perils of the sea. This court held that the evidence was inadmissible. And see *Turner v. Burrows*, 5 Wend. 541, affirmed in error, 8 Ibid. 144.

“ In fine, we believe that the rule of construction applicable to policies of insurance, does not differ from that applied to other mercantile instruments. Its sense and meaning are to be ascertained from the terms of the policy, taken in their plain and ordinary signification; unless such terms have, by the known usage of trade in respect to the subject-matter, acquired a meaning

it is made, where the actual intention of the parties in this respect is not expressly stated, but it is to be inferred from the nature, objects, and occasion of the contract.<sup>1</sup> Any ambiguity of terms may be thus explained by the common signification of those terms in the country where it is made. Thus, "a pack of wool" may differ in weight in Yorkshire and Wiltshire, and the word would be construed to mean the one weight or the other, according to the place where the contract is made.<sup>2</sup> So, also, the terms "cotton in bales" mean compressed bales in some places, and in others merely bags; and the meaning of the phrase would depend upon the place where the contract for the cotton was made.<sup>3</sup> Again, where the lessee of a rabbit warren covenanted to leave on the warren 10,000 rabbits, for which the lessor was to pay £60 per thousand, it was held, that evidence was admissible to show that by the custom of the country the word "thousand," as applied to rabbits, meant one hundred dozen or twelve hundred.<sup>4</sup> But if

distinct from the popular sense of the same terms, or unless the instrument itself taken together, shows that they were understood in some peculiar manner. And that while we may not enlarge or restrict the clear and explicit language of the contract, by proof of a custom or usage; yet in the application of the contract to its subject-matter, in bringing it to bear upon any particular object, the customs and usages of trade are admissible to ascertain what subjects were within, and what were excluded from its operation. Such evidence is proper, on the same principle that proof of the meaning of technical words, and words of science and the arts, is permitted in arriving at the intention of the parties in the construction of contracts."

<sup>1</sup> Story's Conflict of Laws, § 272; *Trimbey v. Vignier*, 1 Bing. N. C. 151, 159; *De La Vega v. Vianna*, 1 B. & Ad. 284; *British Linen Co. v. Drummond*, 10 Barn. & Cres. 903; *Wilcox v. Hunt*, 13 Peters, R. 378, 379; *Harrison v. Sterry*, 5 Cranch, 289, 298; *Robinson v. Bland*, 1 W. Black. 234, 256; *Depau v. Humphreys*, 20 Martin, R. 1, 8, 9, 13, &c.; *Morris v. Eves*, 11 Martin, 730; *Courtois v. Carpentier*, 1 Wash. C. C. R. 376; *Pope v. Nickerson*, 3 Story, R. 484.

<sup>2</sup> *Evans, Pothier on Oblig.* 94, note b; *Master of St. Cross v. Lord Howard de Walden*, 6 T. R. 343.

<sup>3</sup> *Taylor v. Briggs*, 2 Car. & Payne, 525.

<sup>4</sup> *Smith v. Wilson*, 3 Barn. & Adolph. 728. See, however, *Hinton v. Locke*, 5 Hill, R. 437, in which Mr. Justice Bronson expressed a question as to

the law positively establish a particular measure, and prohibit the use of any other, as is the case with respect to corn in England, the contract will be understood to refer to such legal measure, whatsoever be the local usage to the contrary; for no usage can be permitted to supersede the law.<sup>1</sup> So, also, a note made in England for £100, would mean £100 sterling, and a note made in America, for the same nominal sum would be construed to mean £100 in American currency. So, if a contract be made in England for the sale of land in Jamaica, and the vendee agree to give £20,000 for the land, without specifying in what currency, in the absence of all expressions and circumstances intimating a different intention, the contract would be interpreted to mean, that the price should be paid in English currency; although the difference between the English pound sterling and the Jamaica pound, exclusive of any premium on bills of exchange, is forty per cent.<sup>2</sup> Marriage contracts and settlements also come within the same rule.<sup>3</sup> So, where, in an action upon an unstamped agreement made at Jamaica, it appeared that by the law of that island, a stamp was necessary to render it valid; it was held, that the action

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whether the doctrine of this case could be supported, on the ground that it was "a plain contradiction of the express contract of the parties." But he, nevertheless, held, in the case before him where a carpenter was hired at twelve shillings *per day*, that it was admissible for him to show a universal usage among carpenters to consider ten hours labor to be a *day's work*; so that if he worked twelve hours and a half within the twenty-four hours he was entitled to be paid for a day and a quarter. This case seems quite as strong as that of *Smith v. Wilson*, and quite as much in contradiction to the strict words of the contract.

<sup>1</sup> 1 Evans, *Pothier on Oblig.* 94, note b; *Master, &c. of St. Cross v. Lord Howard de Walden*, 6 T. R. 338; *Hockin v. Cooke*, 4 T. R. 314; *Noble v. Durell*, 3 T. R. 271; *The King v. J. Major*, 4 T. R. 750.

<sup>2</sup> Story, *Comm. Conflict of Laws*, § 271, 272; 2 Burge, *Com. on Col. and For. Law*, Pt. 2, ch. 9, p. 860, 861.

<sup>3</sup> Story, *Comm. Conflict of Laws*, § 276; *Anstruthier v. Adair*, 2 Mylne & Keen, R. 513, 516. See, also, *Breadalbane v. Chandos*, cited in 4 Burge, *Comm. on Col. and For. Law*, Appendix, 749, 755; *Feaubert v. Turst*, Prec. Ch. 207; *Decouche v. Savetier*, 3 Johns. Ch. R. 190; *Mostyn v. Fabrigas*, Cowp. 174.

could not be maintained in England.<sup>1</sup> Nor does it make any difference whether the contract be made between foreigners, or between foreigners and citizens;<sup>2</sup> and ignorance of the foreign law will not release a party from a contract made in a foreign country.<sup>3</sup>

§ 654. But although a contract is ordinarily to be construed according to the law of the place where it is made, yet if it be to be performed in some other place, it must be construed according to the law of the place where it is to be performed.<sup>4</sup> If no place of performance be either expressly stated or implied from the terms of the contract, the law of the place where it was made will govern.<sup>5</sup> Thus, where a note is made at Dublin for £100, and payable at London, it would be interpreted to mean £100 in English currency, and not in Irish currency.<sup>6</sup> So, where a merchant in America orders goods to be purchased for him in England, the contract is to be expounded according to the law and custom of England; for there the final consent completing the contract is given, and there the contract is executed.<sup>7</sup> So, also, although the

<sup>1</sup> *Alves v. Hodgson*, 7 T. R. 241; s. c. 2 Esp. 528; *Clegg v. Levy*, 3 Camp. 166.

<sup>2</sup> *Story*, Comm. Conflict of Laws, § 279; *Meade v. Smith*, 3 Conn. 253; *De Sobry v. De Laistre*, 2 Harr. & John. 193, 228.

<sup>3</sup> *Dalrymple v. Dalrymple*, 2 Hagg. Consist. R. 60, 61; *Story*, Comm. Conflict of Laws, § 273; *Blanchard v. Russell*, 13 Mass. 1.

<sup>4</sup> *Story* on Conflict of Laws, § 270, 280; *Andrews v. Pond*, 13 Peters, 65; *Prentiss v. Savage*, 13 Mass. 23; *Chapman v. Robertson*, 6 Paige, R. 627; 2 Kent's Comm. Lect. § 39, p. 457; *Pope v. Nickerson*, 3 Story, R. 484.

<sup>5</sup> *Story*, Comm. Conflict of Laws, § 282; *Coolidge v. Poor*, 15 Mass. 427; *Consequa v. Fanning*, 3 Johns. Ch. R. 487, 610; *Bratford v. Farrand*, 13 Mass. 18; *Milne v. Moreton*, 6 Binn. R. 353, 359, 365; *Pope v. Nickerson*, 3 Story, R. 484.

<sup>6</sup> *Story*, Comm. Conflict of Laws, § 272 a; *Kearney v. King*, 2 B. & Ald. 301; *Sprowle v. Legge*, 1 B. & C. 16.

<sup>7</sup> *Whiston v. Stodder*, 8 Martin, 95; *Malpica v. McKown*, 1 Louis. R. 248, 255. The Lord Chancellor, in the late case of *Pattison v. Mills*, in the House of Lords, said, "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." *Pattison v. Mills*, 1 Dow & Clarke, 342; *Albion F. & L.*

*lex loci contractus* governs as to the rule of interest, in the absence of any express contract, yet if the place of payment or performance be different from that of the contract, interest will be reckoned according to the rate allowed by such place.<sup>1</sup>

§ 655. So, also, if a contract be to be performed partly in one country, and partly in another country, it has a double operation, and each portion is to be interpreted according to the laws of the country where it is to be performed.<sup>2</sup> Thus, where a bill of lading is made of goods, some of which are to be delivered at one port, and some at another, in different countries, the bill of lading is to be construed in reference to the portion delivered at each port, according to the laws of that port.<sup>3</sup> So, also, the same rule applies to contracts of affreightment and shipment, some portions of which are to be performed at the home port, some at the foreign port, and some at the return port.<sup>4</sup>

§ 656. Again, a contract is to be construed in reference to the time when it was made; and to contemporaneous laws and usages. The state of the country, the manners of society, and the customs, which are a fluctuating law, pervading and modifying contracts, are implied in almost every transaction, and therefore will often elucidate questions which, standing alone, would be scarcely intelligible. Ancient grants are, therefore, to be expounded according to the law of the time when they were made.<sup>5</sup> Thus, where a proprietary grant was

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Ins. Co. v. Mills, 3 Wils. & Shaw, 218, 233; 3 Burge, Com. on Col. and For. Law, pt. 2, ch. 20, p. 753.

<sup>1</sup> Story, Comm. Conflict of Laws, § 291 to 297, and cases cited; 2 Kent, Comm. Lect. 32, p. 460; Robinson v. Bland, 2 Burr. 1077; Ekins v. East Ind. Co. 1 P. W. 396; Fanning v. Consequa, 17 Johns. 511.

<sup>2</sup> Pope v. Nickerson, 3 Story, R. 485.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Co. Lit. 8 b; Amb. 288. "Every grant shall be expounded as the intent was at the time of the grant; as if I grant an annuity to J. S. until he be

made in 1680 of “a piece of land below high-water mark, to set a shop upon, not exceeding forty feet in width;” it was construed to extend to low-water mark; and the court said, “whatever may be the construction of analogous words in a recent conveyance, made in terms of precision and accuracy, and when considerable value is attached to flats in the beds of rivers, creeks, and coves, it is obvious, that to apply rigid rules of construction to transactions which took place early after the settlement of the country, when conveyancing was little understood, and when the mud of a river or harbor was supposed to be worth nothing, would be often attended with injustice, and in many instances, subvert the titles to property of almost incalculable value.”<sup>1</sup> Usage, however, or contemporaneous exposition, is not to be called in aid, when the language of a contract is clear and precise, but only where it is equivocal or doubtful; as in the construction of ancient statutes and charters, and other instruments, the meaning of which is obscure.<sup>2</sup>

§ 657. The exposition is to be upon the whole contract, and not upon disjointed parts, taken separately.<sup>3</sup> The object of

promoted to a competent benefice, and at the time of the grant he was but a mean person, and afterwards he is made an archdeacon, yet if I offer him a competent benefice, according to his estate, at the time of the grant, the annuity doth cease.” Per Wray, C. J., Cro. Eliz. 35.

<sup>1</sup> Adams *v.* Frothingham, 3 Mass. 360. See, also, Attorney-General *v.* Parker, 3 Atk. 577; Withnell *v.* Gartham, 6 T. R. 388; Weld *v.* Hornby, 7 East, 199; Codman *v.* Winslow, 10 Mass. 149; Branch's Maxims, Henning's ed. 30.

<sup>2</sup> Iggleston *v.* May, 2 New R. 449; s. c. 7 East, 237; and before Lord Eldon, 9 Ves. 325. See, also, Tritton *v.* Foote, 2 Cox, 174; Rubery *v.* Jersey, 1 T. R. 229; Livingston *v.* Ten Broek, 16 Johns. 23; Peake on Evid. 119, 2d ed.; 3 Stark. Ev. 1031; 1 Phil. Ev. 1st Am. ed. 419, 420; Cortelyou *v.* Van Brundt, 2 Johns. 357; McKeen *v.* Delaney, 5 Cranch, 22; Sheppard *v.* Gosnold, Vaugh. 169; Rogers *v.* Goodwin, 2 Mass. 475; Packard *v.* Richardson, 17 Mass. 144; Stuart *v.* Laird, 1 Cranch, 299, 1 Kent, Comm. 434, 1st ed.; Blankley *v.* Winstanley, 3 T. R. 279; The King *v.* Osbourne, 4 East, 327; Rex *v.* Varlo, Cowp. 250; Mayor of London *v.* Long, 1 Camp. 22.

<sup>3</sup> In the case of Washburn *v.* Gould, 3 Story, R. 162, Mr. Justice Story

the contract, and the intention of the parties, is to be gathered from a consideration of all the parts of the agreement, and one clause is to be interpreted by another.<sup>1</sup> *Ex antecedentibus et consequentibus fit optima interpretatio; nam turpis est pars, qua cum suo toto non convenit.* Thus, where the vendor of an estate warranted it against himself and his heirs, and covenanted that he, “ notwithstanding any thing by him done to the contrary,” was seized lawfully and absolutely in fee-simple, *and that* he had a good right and full power to convey; and the breach of covenant was, that other persons were rightfully entitled to the said land, to whom he had been obliged to become tenant, and had thus lost his fee-simple; it was held, that the general covenant of good right, lawful title, &c., was either a part of the preceding special covenant,—or if not, that it was qualified by the other special covenants against the acts of himself, and his heirs only. Mr. Justice Buller, in this case, said, “ We do not do justice to the parties,

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says, “ There is no magic in particular words, and we must understand them as they stand and are used in the particular instrument; and in searching for the true interpretation, we must look at all the provisions of the instrument, and give such effect to it as its obvious objects and designs require, without merely weighing the precise force of single words.” So, also, Lord Hobart, in Trenchard *v.* Hoskins, Winch. R. 93, says, “ Every deed ought to be construed according to the intention of the parties and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence, and intent ought to be picked out of every part, and not out of one word only.” Lord Ellenborough in Barton *v.* Fitzgerald, 15 East, R. 541, thus states the rule: “ It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus.* Every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done.”

<sup>1</sup> See a thorough discussion of this matter, in Miller *v.* Travers, 8 Bing. 244; 1 Evans' Pothier on Oblig. 96, and note b; Winch. 93; 1 Domat, 37, § 10; Shep. Touch. 87; Knower *v.* Emerson, 9 Pick. 422; Wheelock *v.* Freeman, 13 Pick. 167; Heywood *v.* Perrin, 10 Pick. 230; Morey *v.* Homann, 10 Vermont, 565; Cobbs *v.* Fountaine, 3 Randolph, 487; Colvin *v.* Newberry, 8 Barn. & Cresw. 166; Warren *v.* Merrifield, 8 Metcalf, R. 96; Chase *v.* Bradley, 26 Maine R. 531.

unless we look to the whole deed, and infer from that their real intention. The defendant has expressly told us in one part of the deed, that he means to covenant against his own acts; and are we to say that he has in the same breath covenanted against the acts of all the world?"<sup>1</sup> So, also, a devise of "the farm called Trogue's farm, now in the occupation of C." was held to pass the whole farm, though C. only occupied a portion of it.<sup>2</sup> So, also, where a lease was made of "all that part of Blenheim park, situate in the county of Oxford, now in the occupation of one S." lying within certain specified abuttals, "with all the houses thereto belonging, which are in the occupation of said S.;" it was held, that a house lying within the said abuttals, though not in the occupation of S., would pass.<sup>3</sup>

§ 658. So, also, where two lessees of a colliery "jointly and severally covenanted in the manner following, that is to say," and among other covenants, was one that the moneys appearing to be due "should be accounted for and paid by the lessees, their executors," (omitting the words "and each of them"); it

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<sup>1</sup> *Browning v. Wright*, 2 Bos. & Pul. 13. In *Sumner v. Williams*, 8 Mass. 217, Parker, J. calls this judgment "a triumph of common sense." See, also, 1 Leigh's Nisi Prius, 613, 614; Stannard v. Forbes, 6 Adolph. & Ell. 572; *Foord v. Wilson*, 8 Taunt. 543; *Milner v. Horton*, McLell. 647; *Sicklemore v. Thistleton*, 6 M. & Sel. 9; *Sugden on Vendors*, ch. xiii.; *Gainsford v. Griffith*, 1 Saund. 58, and notes; *Howell v. Richards*, 11 East, 633; *Nind v. Marshall*, 1 Brod. & Bing. 319; *Cole v. Hawes*, 2 Johns. Cas. 203; *Whallon v. Kauffman*, 19 Johns. 97; *Knickerbacker v. Killmore*, 9 Johns. 106; *Barton v. Fitzgerald*, 15 East, 530.

<sup>2</sup> *Goodtitle v. Southern*, 1 Maule & Selw. 299.

<sup>3</sup> *Doe v. Galloway*, 5 B. & Ad. 43. Mr. Justice Parker, in that case, said, "The rule is clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if the premises be described in general terms, and a particular description be added, the latter controls the former." In *Stukeley v. Bulter*, Hob. 171, it is said, "It is in vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence." See *Goodtitle v. Southern*, 1 M. & S. 299.

was held, that this covenant was joint as well as several, in like manner as the other covenants, by reason of the introductory words.<sup>1</sup>

§ 658 a. Another rule, which springs immediately from that just stated, is, that the exposition should, if possible, give effect to every part of a contract, which neither violates the rules of law, nor the intention of the parties. If, therefore, a deed may operate in two ways, the one of which is consistent with the intent of the parties, and the other is repugnant thereto, it will be so construed as to give effect to the intention indicated by the whole instrument.<sup>2</sup> Thus, "if I have in D., blackacre, whiteacre, and greenacre, and I grant you all my lands in D., that is to say, blackacre and whiteacre, yet greenacre shall pass too."<sup>3</sup> So, where A., being the owner of three parcels of land described in a certain deed, conveying them to him, made a deed of conveyance of "three parcels or lots, situated in Portland, and bounded as follows, to wit, the first lot beginning," &c., (setting forth the boundaries of that lot only,) "being the same which was conveyed to me by J. Wylie, by deed dated," &c.; it was held, that the deed conveyed all these parcels; upon the ground, that otherwise, the words, "three parcels," must be rejected as useless; for, to restrict them to the one parcel described particularly, would have been to contradict and destroy their natural meaning. Yet if no reference had been made to the deed, it would have been impossible to ascertain with any certainty, what the two undescribed lots were, and, therefore, the lot specified would alone have passed.<sup>4</sup>

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<sup>1</sup> Duke of Northumberland *v.* Errington, 5 Term R. 526; Rich *v.* Rich, Cro. Eliz. 43. See, also, Gervis *v.* Peade, Cro. Eliz. 615; Woodyard *v.* Dannock, Cro. Eliz. 762; Broughton *v.* Conway, Dyer, 240.

<sup>2</sup> Solly *v.* Forbes, 4 Moore, 448; Hotham *v.* East India Co. 1 T. R. 638.

<sup>3</sup> Stukeley *v.* Butler, per Lord Hobart, Hob. 172; Butler *v.* Duncomb, 1 P. Williams, 448; Throckmorton *v.* Tracy, Plowd. 156; 2 Black. Comm. 379.

<sup>4</sup> Child *v.* Fickett, 4 Greenl. 471. See, also, Willard *v.* Moulton, 4 Greenl.

§ 659. This rule equally applies to the case of wills and deeds. So, if the same property be devised to two persons in the same will, unless the clauses be so stated, as to be irreconcilably repugnant with each other, each party will be entitled to a moiety,—in order to give effect to both gifts. But whether such devise would be joint-tenancy, or in common, there is some diversity of opinion.<sup>1</sup>

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14; *Jackson v. Stevens*, 16 Johns. 110; *Saward v. Anstey*, 2 Bing. 519; Co. Litt. 146 a.

<sup>1</sup> The doctrine stated in the old books is different. They say, that if there be two classes or parts of a deed, one of which is repugnant to the other, the first part shall be received and the last part rejected, unless there be some special reason to the contrary. “Hercin a deed doth differ from a will, for if there be two repugnant clauses in a will, the first shall be rejected and the last received.” Shep. Touch. 88. The latter cases, however, incline to modify this doctrine, and apply the same rule to wills, that governs other contracts. See the old rule, as stated in Owen, 84; Plowd. 541; by Lord Coke, in Co. Lit. 112 b; Shep. Touch. 88. If, however, two devises be only partially inconsistent, but not wholly irreconcilable, the latter will be a revocation of the former only to the extent of the discrepancy. See Lovelass on Wills, 293. “If two parts of a will are totally inconsistent, and cannot possibly be reconciled, the proper rule is, that the latter shall prevail. Doubts have been entertained, where the same thing has been given to two persons, whether they should not be joint-tenants; but the case to which I allude, is, where two parts of the will are totally inconsistent, so that it is impossible for them to coincide.” Constantine *v. Constantine*, 6 Ves. jr. 102, by Lord Alvanley. In Ridout *v. Paine*, Lord Hardwicke puts the case of a devise to A. and his heirs, of a farm in Dale, and in a subsequent part of the will, a devise of the same to B. and his heirs; and says: “That though the old books held this to be a revocation, yet latterly it has been construed either a joint-tenancy, or tenancy in common, according to the limitation.” 3 Atk. 486. See Mr. Butler’s note, Co. Litt. 112 b, n. 1, where he says the better opinion is, that each devisee takes a moiety, when the gifts are repugnant. Lord Brougham, in Sherratt *v. Bentley*, 2 Mylne & Keen, 165, says, in alluding to Mr. Butler’s note, “I think the weight of authority is the other way, and I feel bound to say the law is otherwise, and that Lord Coke’s doctrine is the sound one; and I do so in deference to the weight of authority, and not to the reason of the rule.” But he afterwards says, in the same case, “It seems by no means inconsistent with the rule, as laid down by Lord Coke, and recognized by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift

§ 660. But, whenever one portion of a contract is wholly repugnant to the rest of it, and is irreconcilable with the manifest intention of the parties, as apparent upon a consideration of the whole instrument, it will be stricken out. And effect will be given to the instrument *cy pres*.<sup>1</sup> If, therefore, a thing

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of the same thing, shall abrogate and revoke it, if it be also held, that where the same thing is given to two different persons, in different parts of the same instrument, each may take a moiety; though had the second gift been in a subsequent will, it would, I apprehend, work a revocation." The result of these cases seem to be, that if the two parts of a will be not absolutely and irreconcilably repugnant, they shall be so construed that all the parts shall take effect. See Lovelass on Wills, 294; Wallop *v.* Darby, Yelv. 209; Shove *v.* Dow, 13 Mass. 535; Wykham *v.* Wykham, 18 Ves. 421; Sheratt *v.* Bentley, 2 Mylne & Keen, 157, where all the authorities are ably discussed by Lord Brougham.

<sup>1</sup> Cleveland *v.* Smith, 2 Story, R. 287. In this case, which was a case of a sale of a lot of land the boundary of which was misdescribed through mistake, the intent of the parties being perfectly clear; Mr. Justice Story said: "It is the common case of a latent ambiguity; and the real question is, what, in a case of mutual mistake in the descriptive words of the instrument, is to be done? Now, there can be but one of two courses adopted by a court of justice, under such circumstances; one of which is to set aside the instrument as inoperative, on account of the mistake, which would, in this case, be to defeat the object of both parties; the other is, to ascertain the real intention of the parties from the words of grant taken altogether, *ex visceribus concessionis*; and to give effect to that intention, notwithstanding the misdescription, if I may so say, *cy pres*, rejecting such of the descriptive words as are inconsistent with that intention, or are properly to be deemed subordinate, as accidents, and not as incidents thereto. This latter doctrine is the doctrine adopted by courts of law, upon the ground of the well-known maxim, *Ut res magis valeat, quam pereat*. There is no magic in particular instruments; the doctrine is equally applicable to all instruments, where the intention is sought for, and is to be executed. Thus, in a will, if there be a general intention expressed, and a particular intention repugnant to the former, the rule of interpretation is, that the particular intention is to be rejected, and the general intention is to be carried into effect, as the predominant intention of the testator. So if there be a partial misdescription in a will of the devisee or legatee, or of the thing devised or bequeathed, and yet the party or the thing can, by reasonable interpretation, be ascertained with reference to the extrinsic evidence, creating the doubt, courts of law, as well as of equity, will reject such part of the misdescription as is manifestly unessential, and give full effect to the main

be granted generally, with a proviso, which annuls the grant, the proviso will be considered as a nullity. Thus, if there be a demise of a parsonage, with the lands and woods, except the woods, the exception is void. So, also, if a lease be made for ten years certain, with the condition, that the term shall be at the will of the lessor, the condition is void.<sup>1</sup>

§ 661. Yet, if the condition be only explanatory, and not repugnant to the rest of the contract, it will operate as a limitation; as, if one lease be made of two houses, the term as to one being limited to five years, and that of the other to ten. So, also, if a feoffment be made of two acres, one to be held in fee and the other in tail, effect will be given to the condition, for the *habendum* only explains the manner of taking, without restraining the gift.<sup>2</sup> Indeed, wherever a general and indeterminate stipulation, occurring in a previous part of a contract, is limited by a subsequent clause, effect must be given to both clauses. But, if the subsequent stipulation contradict and restrict what was distinctly stated, and constituted a principal inducement to the contract, it will be of no effect.<sup>3</sup>

§ 662. The last rule of interpretation is, that terms, which

intention, deducible from the words. Now, precisely the same doctrine is applied to the interpretation of deeds and other written instruments. If the descriptive words are, with reference to the actual facts, repugnant or inconsistent with each other, and yet the intention of the parties can be ascertained, the misdescription will not vitiate the instrument; but it will yield to the clearly ascertained intention. And it is only when the language, with reference to the actual facts, involves such fatal errors and mistakes, as leaves the court without reasonable means of ascertaining the real intention, that the instrument will be treated as a nullity.”

<sup>1</sup> Bacon, Abr. Grants, L. 1; Stukely *v.* Butler, Hob. 172, 173; Moore, 881; Jackson *v.* Ireland, 3 Wend. 99.

<sup>2</sup> Bacon, Abr. Grants, L. 1; Stukely *v.* Butler, Moore, 880.

<sup>3</sup> See Cutler *v.* Tufts, 3 Pick. 272; Saville, 71, pl. 147; Weak *v.* Escott, 9 Price, 595; Crowley *v.* Swindles, Vaugh. 173; Ferguson *v.* Harwood, 7 Cranch, 414; Vernon *v.* Alsop, T. Ray. 68; 1 Lev. 77; Mills *v.* Wright, 1 Freem. 247.

are doubtful or ambiguous, are to be taken most strongly against the person engaging; unless some wrong is thereby done. *Verba ambigua chartarum fortius accipiuntur contra proferentem.*<sup>1</sup> As if a tenant in fee-simple, grant to any one

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<sup>1</sup> The rule of the civil law is, "In case of doubt, a clause ought to be interpreted against the person who stipulates any thing, and in discharge of the person who contracts the obligation." 1 Evans, Poth. on Oblig. 97, 7th rule. This rule, though apparently the same in terms, is directly the reverse in its meaning and operation, for by the Roman law the words of the stipulation were necessarily those of the person to whom the promise was made; the person promising, only assented to the question proposed by the person stipulating. 1 Evans, Pothier on Oblig. 97, note a, to 70; Sheppard's Touchstone, 88. In *Charles River Bank v. Warren Bridge Co.* 11 Peters, 589, Mr. Justice Story, in delivering a dissenting opinion in respect to the construction of public grants, says: "It is a well-known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails, in cases of grants by the king; for, where there is any doubt, the construction is made most favorably for the king, and against the grantee. The rule is not disputed. But it is a rule of very limited application. To what cases does it apply? To such cases only, where there is a real doubt, where the grant admits of two interpretations, one of which is more extensive, and the other more restricted; so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant. If the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail; for the reason, (says the common law,) 'that it will be more for the benefit of the subject, and the honor of the king, which is to be more regarded than his profit.' Com. Dig. Grant, G. 12; 9 Co. R. 131, a.; 10 Co. R. 67, b.; 6 Co. R. 6. And in every case, the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favor of the king. And, if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced. The rule itself is also expressly dispensed with, in all cases where the grant appears upon its face, to flow, not from the solicitation of the subject, but from the special grace, certain knowledge, and mere motion of the crown; or, as it stands in the old royal patents, 'ex speciali gratiâ, certâ scientiâ, et ex mero motu regis;' (see Arthur Legat's case, 10 Co. R. 109, 112, b.; Sir John Molyn's case, 6 Co. R. 6; 2 Black. Comm. 347; Com. Dig. Grant, G. 12,) and these words are accordingly inserted in most of the modern grants of the crown, in order to exclude any narrow construction of them. So, the court admitted the doc-

"an estate for life" generally; it will be construed to be an estate for the life of the grantee; unless such a construction

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trine to be, in *Attorney-General v. Lord Eardly*, 8 Price, 69. But what is a most important qualification of the rule, it never did apply to grants made for a valuable consideration by the crown; for, in such grants the same rule has always prevailed, as in cases between subjects. The mere grant of a bounty of the king may properly be restricted to its obvious intent. But the contracts of the king for value are liberally expounded, that the dignity and justice of the government may never be jeopardized by petty evasions and technical subtleties." And again he says: "As to the manner of construing parliamentary grants for private enterprise, there are some recent decisions, which, in my judgment, establish two very important principles applicable directly to the present case; which, if not confirmatory of the views, which I have endeavored to maintain, are at least not repugnant to them. The first is, that all grants for purposes of this sort are to be construed as contracts between the government and the grantees, and not as mere laws; the second is, that they are to receive a reasonable construction; and that if either upon their express terms, or by just inference from the terms, the intent of the contract can be made out, it is to be recognized and enforced accordingly. But if the language be ambiguous, or if the inference be not clearly made out, then the contract is to be taken most strongly against the grantor, and most favorably for the public. The first case is *The Company of Proprietors of the Leeds and Liverpool Canal v. Hustler*, 1 Barn. & Cres. 424, where the question was upon the terms of the charter, granting a toll. The toll, was payable on empty boats passing a lock of the canal. The court said: 'No toll was expressly imposed upon empty boats, &c., and we are called upon to say that such a toll was imposed by inference. Those who seek to impose a burden upon the public, should take care that their claim rests upon plain and unambiguous language. Here the claim is by no means clear.' The next case was the *Kingston-upon-Hull Dock Company v. La Marche*, 8 Barn. & Cres. 42, where the question was as to a right to wharfage of goods shipped off from their quays. Lord Tenterden, in delivering the judgment of the court in the negative, said: 'This was clearly a bargain made between a company of adventurers and the public; and, as in many similar cases, the terms of the bargain are contained in the act; and the plaintiff's can claim nothing which is not clearly given.' The next case is *The Proprietors of the Stourbridge Canal v. Wheeley*, 2 Barn. & Adolph. 792, in which the question was as to a right to certain tolls. Lord Tenterden, in delivering the opinion of the court, said: 'This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute. And the rule of construction in all such cases is now fully established to be

contradict the evident intention of the parties. This rule, however, strictly applies to deeds poll only, in which the deed being executed by the grantor alone, the words are to be considered as his own words, and therefore to be construed most strongly against him. But when an indenture is executed by both parties, the words are often to be considered as the words of both.<sup>1</sup> But whenever a covenant is made by a particular party in an indenture, it will be construed most strongly against him; and, generally, exceptions in deeds and other instruments are to be construed most strongly against the party for whose benefit they are introduced. Thus, words of exception used by underwriters in a policy of insurance, to exempt them from a general liability, are to be construed most strongly against the underwriters.<sup>2</sup> So, also, exceptions or

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this: that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act. 'Now, it is quite certain, that the company have no right expressly given to receive any compensation, except, &c.; and, therefore, it is incumbent upon them to show, that they have a right, clearly given by inference from some other of the clauses.' This latter statement shows, that it is not indispensable, that in grants of this sort, the contract or the terms of the bargain should be in express language; it is sufficient if they may be clearly proved by implication or inference.

"I admit, that where the terms of a grant are to impose burdens upon the public, or to create a restraint injurious to the public interest, there is sound reason for interpreting the terms, if ambiguous, in favor of the public. But at the same time, I insist, that there is not the slightest reason for saying, even in such a case, that the grant is not to be construed favorably to the grantee, so as to secure him in the enjoyment of what is actually granted." See, also, *Huidekoper's Lessee v. Douglass*, 3 Cranch, R. 1; s. c. 1 Peters, Cond. R. 446; *U. S. v. Gurney*, 4 Cranch, R. 333.

<sup>1</sup> 2 Black. Comm. 380-384; *Co. Litt.* 42; *Evans v. Sanders*, 8 Porter, 497; *Doe v. Dodd*, 2 Nev. & Man. 838; 5 B. & Ad. 689; *Earl of Cardigan v. Armitage*, 2 B. & C. 197, 206; *Palmer v. Warren Ins. Co.* 1 Story, R. 365; *Blackett v. Royal Exch. Ins. Co.* 2 Cromp. & Jerv. 244; *Donnell v. Columbian Ins. Co.* 2 Sumner, 380; *Story on Agency*, § 73, 74, 75; *Burrell v. Jones*, 3 B. & Ald. 49; *Brown v. M'Gran*, 14 Peters, 480; *Bullen v. Denning*, 5 Barn. & Cres. 847.

<sup>2</sup> *Palmer v. Warren Ins. Co.* 1 Story, R. 364; *Blackett v. Royal Exch. Ins.*

reservations in a deed, or lease, are to be interpreted in favor of the grantee or lessee; and if uncertain or indefinite in their terms, the grantee and lessee are to receive the benefit accruing therefrom.<sup>1</sup> So, also, recitals in a deed, as that certain property has become the property of a particular person, are evidence against the grantor.<sup>2</sup>

§ 662 a. Where exclusive privileges are granted by the legislature to individual private companies, by which the rights of the public are abridged, the terms of the act by which they are conferred is to be construed strictly, and in cases of doubt or ambiguity against the grantees. Thus, where a grant is made of a right to take tolls, the words are to be construed in favor of the public, and the grantees can take nothing which is not clearly given.<sup>3</sup>

§ 663. This general rule is only to be resorted to, when all other rules of exposition fail; and it gives place to every other rule. It is not regarded with much favor, and “being a rule of some strictness and rigor,” says Lord Bacon, “doth not as it were its office, but in the absence of other rules, which are of some equity and humanity.”<sup>4</sup> At the present day, this rule is

Co. 2 Cromp. & Jerv. R. 244; *Donnell v. Columbian Ins. Co.* 2 Sumner, R. 380; *Earl of Cardigan v. Armitage*, 2 Barn. & Cres. 197; *Bullen v. Denning*, 5 B. & C. R. 847, 850; *Yeaton v. Fry*, 5 Cranch, 335.

<sup>1</sup> *Jackson v. Hudson*, 3 Johns. 375; *The Earl of Cardigan v. Armitage*, 2 Barn. & Cres. 197; *Bullen v. Denning*, 5 Barn. & Cres. 847-850; *Jackson v. Gardner*, 8 Johns. 394.

<sup>2</sup> *Penrose v. Griffith*, 4 Binn. 281; *Stoever v. Whitman*, 6 Binn. 416; *Garrison v. Dennis*, 4 Binn. 314.

<sup>3</sup> *Blakemore v. Glamorganshire Can. Nav.* 1 C. M. & R. 133; Proprietors of the Leeds and Liverpool Canal *v. Hustler*, 1 Barn. & Cres. 424; *Barrett v. Stockton, &c. Railway Co.* 2 Man. & Grang. 135; *Mohawk Bridge Co v. Utica & Schen. R. R. Co.* 6 Paige, R. 554; *Priestley v. Foulds*, 2 Man. & Grang. 194. See § 662, note 1, p. 51.

<sup>4</sup> Bacon's Maxims of the Law, No. 3; 2 Kent, Lect. 39, p. 556. See, also, *Adams v. Warner*, 23 Verm. R. 411, in which Mr. Justice Redfield says: “This rule of construction is not properly applicable to any case, but one of strict *equivocation*, where the words used will bear either one or two or more in-

ordinarily only applied where the terms of a contract are ambiguous; and, in such cases, the stipulations of the party promising are so far construed against him, as to give some effect to his engagement.<sup>1</sup> Whenever, therefore, it would operate as an inequitable exaction upon the party; as in the case of penalties and forfeitures, or of disproportionate and burdensome conditions, intended to secure the principal obligation,—or where it would operate as a wrong upon third persons, it will not be applied.<sup>2</sup> So, also, laws will be construed strictly, to save a right, or avoid a penalty; and liberally, in order to give a remedy.<sup>3</sup> Thus, although, where the owner of an estate in fee makes a lease for life, without expressing for whose life, it shall be intended for the life of the lessee, as most favorable to him; yet it is otherwise, if such lease be given by a tenant in tail; for if it were to be construed for the life of the lessee, it might injure the reversioner.<sup>4</sup>

§ 664. The rule, however, has a limited operation in doubtful cases, where the circumstances demand such a construction as to effect the manifest intention of the party. Thus, where a release of "all lands, belonging, used, occupied, and enjoyed, or deemed, taken, or accepted, as part of the Clock Mills," was given to the plaintiff; it was held, that certain leasehold lands, which had been considered as part of the said mills for a number of years, would pass as well as freehold; and that the rule applied, that a deed should be construed most strongly

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interpretations equally well. In such a case, if there were no other legitimate mode of determining the equipoise, this rule might well enough decide the case. In all other cases, where this rule of construction is dragged in by way of argument,—and that is almost always, where it happens to fall on the side, which we desire to support,—it is used as a mere makeweight, and is rather an argument, than a reason."

<sup>1</sup> Am. Jur. No. 47, vol. xxiv., p. 12; Palmer *v.* Warren Ins. Co. 1 Story, 369.

<sup>2</sup> 1 Pow. on Cont. 397, et seq.; 3 Chit. Com. L. 115; Co. Lit. 42, 183; 2 Story, Eq. Jurisp. ch. 34.

<sup>3</sup> Whitney *v.* Emmett, 1 Baldwin, C. C. R. 316. See post, p. 593, note.

<sup>4</sup> Co. Litt. 42, 183.

against the grantor; because a conveyance by lease and release might pass a leasehold interest; and because, unless this construction were given, the defendant would be enabled, after a long interval of time, to invalidate his own conveyance, for the purpose of obtaining an unjust possession.<sup>1</sup> So, also, in case of guaranties, if there be any doubt, the contract will be construed most strictly against the party who becomes bound.<sup>2</sup> So, also, if the inducement or proposition upon which a contract is founded be ambiguously stated by one party, so as to operate as a surprise upon the other party, such statement will be construed in favor of the party deceived, although the deception be unintentional; for, in such case, the party affording a ground of mistake, should bear the responsibility. Thus, if a carrier give two different notices, containing different limitations of his responsibility, in case of a loss of goods, he is bound by that which is least beneficial to himself.<sup>3</sup>

§ 665. The same rule also applies to cases where, by the terms of a contract, an election is given to either party of one of two several things. In such case, the person who is to do the first act has the election; and that person will be the promisor or promisee, according to the nature of the agreement. Whenever, therefore, the promisee has the election, the contract will be construed in his favor. Thus, if a testator, by his will, should give to a certain legatee, an absolute legacy of ten thousand dollars, or an annuity of one thousand dollars, during his life, he might elect whichever he pleased. Or, if a man convey two acres, one for life, and the other in fee, the grantee would have the election to take either one or the other in fee.<sup>4</sup> So, also, if a proposition be in the alternative;

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<sup>1</sup> Doe *v.* Williams, 1 H. Black. 25-27.

<sup>2</sup> Hargreave *v.* Smee, 6 Bing. 244; s. c. 3 Moore & Payne, 573; Evans *v.* Whyle, 3 Moore & Payne, 136; Bell *v.* Bruen, 17 Peters, R. 161.

<sup>3</sup> Munn *v.* Baker, 2 Stark. 255.

<sup>4</sup> Bacon, Abr. Election, B; Com. Dig. Election, A; 2 Roll. on Legacies, by White, ch. 23, p. 480-578.

or if an instrument be so drawn, that it will bear two interpretations, the party to whom the proposition is made, or to whom the instrument is given, has the election; <sup>1</sup>—as, for instance, where an instrument is so drawn that it may be considered either as a bill of exchange or a promissory note, the holder may treat it as either.<sup>2</sup>

§ 666. But if the person, by his own wrong or default, lose his election,—as if he bound, in the alternative, to do one of two things, by a certain day, and he suffer the day to pass, without making an election, by performing one or the other, the other party may elect which he will demand.<sup>3</sup> Thus, where, by terms of a contract, the party agreed to pay six hundred dollars for a patent right, at the end of twelve months, or to account for the profits, and he did neither; it was held that the other party might enforce the payment of the six hundred dollars, although such sum exceeded the actual profits.<sup>4</sup>

§ 667. The mere omission of the party having the election, to perform one alternative, may, in some cases, operate as an election of the other. Thus, if goods be sold, on a credit of six or nine months, and the purchaser do not pay when six months have elapsed, it will be considered as an election to take nine months' credit.<sup>5</sup> If, however, the contract had

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<sup>1</sup> *Dann v. Spurrier*, 3 Bos. & Pul. 399, 442; s. c. 7 Ves. 231; *S. P. Doe v. Dixon*, 9 East, 15. See, however, *Goodright v. Richardson*, 3 T. R. 462; *Edis v. Berry*, 6 Barn. & Cres. 433; s. c. 9 Dowl. & Ry. 492; 2 Car. & Payne, 559.

<sup>2</sup> *Edis v. Berry*, 6 Barn. & Cres. 433; *Miller v. Thompson*, 4 Scott, N. R. 204; *Block v. Bell*, 1 Mood. & Rob. 149.

<sup>3</sup> Com. Dig. Election, A.; Co. Litt. 145 a; Bacon, Abr. Election, B.

<sup>4</sup> *McNitt v. Clark*, 7 Johns. 465; *S. P. Moore v. Morecomb*, Cro. Eliz. 864; *Abbot v. Rookwood*, Cro. Jac. 592; 24 Am. Jur. 15.

<sup>5</sup> *Price v. Nixon*, 5 Taunt. 338.

been to give notes for two months at the end of three months, it would be otherwise, and the general rule would prevail.<sup>1</sup>

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<sup>1</sup> *Mussen v. Price*, 4 East, 147; *Brooke v. White*, 1 New R. 330; *Cothay v. Murray*, 1 Camp. 335.

The following rules, laid down by Mr. Justice Story, in an article written by him on Law, Legislation, and Codes, for the *Encyclopædia Americana*, relate to the interpretation of statutes, but as they apply generally to the interpretation of contracts, they may not be without interest in this place. "The fundamental maxim of the Common Law in the interpretation of statutes or positive laws, is, that the intention of the legislature is to be followed. This intention is to be gathered from the words, the context, the subject-matter, the effects and consequences, and the spirit or reason of the law. But the spirit and reason are to be ascertained, not from vague conjecture, but from the motives and language apparent on the face of the law. 1. In respect to words, they are to be understood in their ordinary and natural sense, in their popular meaning and common use, without a strict regard to grammatical propriety or nice criticism. But the ordinary sense may be departed from, if the context or connection clearly requires it; and then such a sense belonging to the words is to be adopted as best suits the context. 2. Again; terms of art and technical words are to be understood in the sense which they have received in the art or science to which they belong. 3. If words have different meanings, and are capable of a wider or narrower sense, in the given connection that is to be adopted which best suits the apparent intention of the legislature, from the scope or provisions of the law. 4. And this leads us to remark, that the context must often be consulted, in order to arrive at a just conclusion, as to the intent of the legislature. The true sense in which particular words are used in a particular passage, may be often determined by comparing it with other passages and sentences, when there is any ambiguity, or intricacy, or doubt, as to its meaning. 5. And the professed objects of the legislature in making the law often afford an excellent key to unlock its meaning. Hence resort is often had to the preamble of a statute, which usually contains the motives of passing it, in order to explain the meaning, especially where ambiguous phrases are used. 6. For the same purpose, the subject-matter of the law is taken into consideration; for the words must necessarily be understood to have regard thereto, and to have a larger or narrower meaning, according as the subject-matter requires. It cannot be presumed, that the words of the legislature were designedly used in a manner repugnant to the subject-matter. 7. The effects and consequences must also be taken into consideration. If the effects and consequences of a particular construction would be absurd, and apparently repugnant to any legislative intention deducible from the objects or context of the statute, and another

construction can be adopted, which harmonizes with the general design, the latter is to be followed. But in all such cases where the effects and consequences are regarded, they are not permitted to destroy the legislative enactment, or to repeal it, but simply to expound it. If, therefore, the legislature has clearly expressed its will, that is to be followed, let the effects and consequences be what they may. But general expressions, and loose language, are never interpreted so as to include cases which manifestly could not have been in the contemplation of the legislature. 8. The reason and spirit of the law are also regarded; but this is always in subordination to the words, and not to control the natural and fair interpretation of them. In short, the spirit and the reason are derived principally from examining the whole text, and not a single passage; from a close survey of all the other means of interpretation, and not from mere private reasoning as to what a wise or beneficent legislature might or might not intend. Cases, indeed, may readily be put, which are so extreme, that it would be difficult to believe that any rational legislature could intend what their words are capable of including. But these cases furnish little ground for practical reasoning, and are exactly of that class, where, from the generality of the words, they are capable of contraction or extension, according to the real objects of the legislature. These objects once ascertained, the difficulty vanishes. This natural, and sometimes necessary limitation upon the use of words in a law, we often call construing them by their *equity*. In reality nothing more is meant, than that they are construed in their mildest, and not in their harshest sense, it being open to adopt either. 9. For the same purpose, in the common law, regard is often had to antecedent and subsequent statutes upon the same subject; for being in *pari materia*, it is natural to suppose, that the legislature had them all in their view in the last enactment, and that the sense which best harmonizes with the whole, is the true sense. 10. For the like reason words and phrases in a statute, the meaning of which has been ascertained (especially a statute on the same subject), are, when used in a subsequent statute, presumed to be used in the same sense, unless something occurs in it to repel the presumption. 11. As a corollary from the two last rules, it is a maxim of the common law, that all the statutes upon the same subject, or having the same object, are to be construed together as one statute; and then every part is to be taken into consideration. 12. Another rule is, to construe a statute as a whole, so as, if possible, or as nearly as possible, to give effect, and reasonable effect, to every clause, sentence, provision, and even word. Nothing is to be rejected as void, superfluous, or insignificant, if a proper place and use can be assigned to it. 13. If a reservation in a statute be utterly repugnant to the purview of it, the reservation is to be rejected; if the preamble and the enacting clauses are different, the latter are to be followed. But the reservation may qualify the purview, if consistent with it, and the preamble control the generality of expression of the enacting clauses, if it gives a complete and satisfactory exposition of the apparent legislative intention. 14. The com-

mon law is also regarded, as it stood antecedently to the statute, not only to explain terms, but to point out the nature of the mischief, and the nature of the remedy, and thus to furnish a guide to assist in the interpretation. In all cases of a doubtful nature, the common law will prevail, and the statute not be construed to repeal it. 15. Hence, where a remedy is given by statute for a particular case, it is not construed to extend so as to alter the common law in other cases. 16. Remedial statutes are construed liberally; that is, the words are construed in their largest sense, so far as the context permits, and the mischief to be provided against justifies. By remedial statutes, we understand those whose object is to redress grievances, and injuries to persons, or personal rights and property in civil cases. Thus, statutes made to suppress frauds, to prevent nuisances, to secure the enjoyment of private rights are deemed remedial. 17. So, statutes are to be construed liberally which concern the public good; such as statutes for the advancement of learning, for the maintenance of religion, for the support of the poor, for the institution of charities. 18. The general rule is, that the sovereign or government is not included within the purview of the general words of a statute, unless named. Thus, a statute respecting all persons generally is understood not to include the king. He must be specially named. But, nevertheless, in statutes made for the public good, which are construed liberally, the king, although not named, is often included by implication. 19. On the other hand, penal statutes, and statutes for the punishment of crimes, are always construed strictly. The words are construed most favorably for the citizens and subjects. If they admit of two senses, each of which may well satisfy the intention of the legislature, that construction is always adopted which is the most lenient. No case is ever punishable, which is not completely within the words of the statute, whatever may be its enormity. No language is ever strained to impute guilt. If the words are doubtful, that is a defence to the accused; and he is entitled, in such a case, to the most narrow exposition of the terms. This rule pervades the whole criminal jurisprudence of the common law, and is never departed from under any circumstances. It is the great leading principle of that jurisprudence, that men are not to be entangled in the guilt of crimes upon ambiguous expressions. But it is not to be understood, that the statute is to be construed so as to evade its fair operation. It is to have a reasonable exposition, according to its terms; and, though penal, it is not to be deemed odious. 20. Private statutes, also, generally receive a strict construction; for they are passed at the suggestion of the party interested, and are supposed to use his language. 21. Statutes conferring a new jurisdiction, and, especially a summary jurisdiction contrary to the general course of the common law, are construed strictly. They are deemed to be in derogation of the common rights and liberties of the people under the common law, and are on that account jealously expounded. There are many other rules, of a more special character, for the construction of statutes, which the extreme solicitude of the common law to introduce certainty, and to limit

the discretion of judges, has incorporated into its maxims. But they are too numerous to be dwelt upon in this place. They all, however, point to one great object,—certainty and uniformity of interpretation ; and no court would now be bold enough, or rash enough, to gainsay or discredit them. On the contrary, it is the pride of our judicial tribunals constantly to resort to them for the purpose of regulating the necessary exercise of discretion in construing new enactments.”

## CHAPTER XXII.

## OF THE ADMISSIBILITY OF PAROL EVIDENCE TO AFFECT WRITTEN AGREEMENTS.

§ 668. THIS subject comes more properly under that branch of law, which treats of evidence, yet the subject of interpretation seems necessarily to require a brief outline, at least of the doctrine of parol evidence, affecting written agreements, in order to give it completeness.

§ 669. The rule of law on this subject is, that parol contemporaneous evidence is inadmissible to contradict or to vary the terms of a valid written instrument.<sup>1</sup> This rule, although introduced in early times, when a seal accompanied every written agreement, and was often the only signature of the party, has still continued in force, and is applicable as well to simple contracts, as to contracts under seal.<sup>2</sup> Thus, if a party should make a written contract, or indorse a note, or draw a bill of exchange, in his own name, he could not discharge himself from personal liability by parol evidence that he was acting in the matter solely in the capacity of agent, since this would be to contradict the actual terms of the contract.<sup>3</sup>

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<sup>1</sup> 1 Phil. & Am. on Evidence, p. 753; 2 Stark. Evid. 544, 548; *Adams v. Wordley*, 1 Mees. & Welsb. 379, 380; 1 Greenl. Evid. § 275; *Boorman v. Johnston*, 12 Wend. 573; *Miller v. Travers*, 8 Bing. 244.

<sup>2</sup> *Stackpole v. Arnold*, 11 Mass. 31. See, also, *Woollam v. Hearn*, 7 Ves. 218; *Hunt v. Adams*, 7 Mass. 522.

<sup>3</sup> *Higgins v. Senior*, 8 Mees. & Welsb. 844, 845; *Gray v. Gutteridge*, 1 M. & R. 618; *Leadbitter v. Farrow*, 5 M. & S. 345.

§ 670. The object of interpretation is, as we have seen, to ascertain the intention of the parties. Whenever such intention is clearly and definitely expressed, no rules of interpretation are requisite, but only in cases where there is an ambiguity or deficiency in the record of such intention. These rules, however, would be often incapable of application, without the introduction of evidence in respect to certain facts and circumstances, the existence of which is presupposed by them. Many such facts and circumstances must necessarily exist, which, although entirely unrecorded, materially affect the nature and extent of a contract, and the situation of the parties; and in respect to these, parol evidence is admitted. Where a contract is not reduced to writing, it is manifest that parol evidence is the only evidence which can be given, in respect to its nature, object, and extent.

§ 671. Inasmuch as the terms of a written contract manifestly contain a more deliberate and definite record of the intention and mutual understanding of the parties, than that loose talk which usually precedes a contract,<sup>1</sup> the law has rightly insisted, that the parties shall not *contradict* such an instrument by parol evidence.<sup>2</sup> Thus, where A. entered into a written agreement to haul all the logs upon a certain lot to another place before a stated time, it was held, that he could not introduce evidence to show, that at the time of making the contract, he said, that if there should not be snow enough

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<sup>1</sup> See *Carter v. Hamilton*, 11 Barb. R. 147; *Hakes v. Hotchkiss*, 23 Verm. R. 231.

<sup>2</sup> Lord Tenterden, in *Kain v. Old*, 2 B. & C. 634, says: "When the whole matter passes in parol, all that passes may sometimes be taken together, as forming parcel of that contract, though not always; because matter talked of at the commencement of a bargain may be excluded by the language used at the termination. But if the contract be reduced to writing, nothing which is not found in the writing can be considered as part of the contract." See, also, *Finney v. Bedford Commercial Ins. Co.* 8 Metcalf, R. 348; *M'Lellan v. Cumberland Bank*, 11 Shepley, R. 566; *Hodgdon v. Waldron*, 9 N. Hamp. R. 66; *Sayre v. Peck*, 1 Barb. R. 464.

he should leave them on the ground.<sup>1</sup> So a bill of sale, absolute upon its face, cannot be proved by parol to have been on condition.<sup>2</sup> So, also, in an action for use and occupation, where an absolute lease had been given in writing, it was held, that parol evidence could not be admitted to show, that the lessor said, on signing it, that it was not in accordance with her previous agreement, and that she did it upon the parol condition, that a different lease should be substituted afterwards; for this would be to change an absolute lease into a conditional one.<sup>3</sup>

§ 671 *a.* But in consideration of the difficulty of comprehending, within the terms of a contract, all that the parties intend, and from the mischief, which might often result from too rigid and literal an interpretation thereof, a modification has been introduced, in cases where the language employed is either technical, ambiguous, or obscure. In such cases, parol evidence is admissible, not to contradict or vary the terms of a written contract, but either to explain and interpret what were otherwise doubtful; or to supply some deficiency.<sup>4</sup> Thus, parol evidence of usage is admissible to explain the terms of a contract. So, the testimony of *experts* is admitted, to explain technical terms, either local or provincial, or to interpret and decipher characters and signs, or to translate from foreign languages.<sup>5</sup> So, also, contemporaneous writings, relating to

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<sup>1</sup> *Hodgdon v. Waldron*, 9 N. Hamp. R. 66.

<sup>2</sup> *Davis v. Bradley*, 24 Verm. R. 55.

<sup>3</sup> *Browning v. Haskell*, 22 Pick. R. 310. See, also, *Keyes v. Dearborn*, 12 N. Hamp. R. 52.

<sup>4</sup> 1 Greenleaf on Evid. § 278, et seq. See, also, *Hiscocks v. Hiscocks*, 5 Mees. & Welsb. 363, 367, where the matter is ably discussed by Lord Abinger; *Hoadley v. Maclaine*, 4 M. & Scott, 340; *Hasbrook v. Paddock*, 1 Barb. S. C. R. 635.

<sup>5</sup> 1 Greenl. on Evid. § 280, 281, 292; 2 Stark. Evid. 565; *Birch v. Depeyster*, 1 Stark. R. 210, and cases there cited; *Smith v. Wilson*, 3 Barn. & Adolph. 728; *Astor v. Union Ins. Co.* 7 Cow. 202.

the same subject-matter, are admissible in evidence.<sup>1</sup> So, also, parol evidence may be given to explain facts and circumstances, to which the contract relates; and persons or property mentioned therein may be identified when designated by nicknames, by which they are not commonly known.<sup>2</sup> So, also, if there be an ambiguity as to which of two or more persons or things be intended, it may be elucidated by parol evidence; or, if there be a declaration by one party assented to by the other, of the meaning intended to be given to certain terms or clauses, when such term or clause is obscure or ambiguous,<sup>3</sup> parol evidence of such fact may be given. So, also, whatever goes to limit the terms of a contract may be given in evidence; as printed rules on the walls of a horse bazaar, limiting the vendor's liability, on a warranty of a horse, to a certain time.<sup>4</sup> So where a broker made an entry of a sale in his books without mentioning that it was a sale by sample, it was held that parol evidence of such fact was admissible, it appearing, that no bought and sold note had been given.<sup>5</sup> So, also, a new agreement in respect to the subject-matter of the contract, and additional thereto, may be proved by parol, if it do not con-

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<sup>1</sup> *Leeds v. Lancashire*, 2 Camp. 205; *Hartley v. Wilkinson*, 4 Camp. 127; 1 *Greenleaf on Evid.* § 283, and cases cited.

<sup>2</sup> *Edge v. Salisbury*, Ambl. R. 70; *Baylis v. Attorney-General*, 2 Atk. R. 239; *Goodinge v. Goodinge*, 1 Ves. sen. 231; *Hiscocks v. Hiscocks*, 5 Mees. & Welsb. 363, 367; *Jeacock v. Falkener*, 1 Bro. Ch. 295; *Fonnereau v. Boyntz*, Ib. 473; *Mackell v. Winter*, 3 Ves. 540; *Lane v. Earl Stanhope*, 6 T. R. 345; *Doe v. Huthwaite*, 3 Barn. & Ald. 632; 1 *Greenleaf on Evid.* § 288.

<sup>3</sup> 1 *Greenl. on Evid.* § 288, and cases cited; 1 *Phil. & Am. on Evid.* 732; *Doe d. Preedy v. Holtom*, 4 Adolph. & Ell. 76; *Sanford v. Raikes*, 1 Meriv. 646; *Colbourn v. Dawson*, 4 Eng. Law & Eq. R. 378; *Goldshede v. Swan*, 1 Excheq. R. 154.

<sup>4</sup> *Bywater v. Richardson*, 1 Adolph. & Ell. 508. See, also, *Murley v. M'Dermott*, 3 Nev. & Perry, 356; *Jeffery v. Walton*, 1 Stark. 267. See *Story on Agency*, § 79.

<sup>5</sup> *Waring v. Mason*, 18 Wend. R. 425. And see *Syers v. Jonas*, 2 Excheq. R. 111.

tradict the terms of the original agreement.<sup>1</sup> Thus, where A., by a written instrument, conveyed property to B. in consideration of a certain sum paid therefor, an additional oral agreement may be shown to repay the sum, on the happening of a certain event.<sup>2</sup>

§ 672. Similar ambiguities and obscurities often occur in wills; and the doctrine of the admissibility of parol evidence, is as equally applicable to wills as to contracts. Thus, where a devise of lands was made to John Cluer of Calcot, there being father and son of the same name, parol evidence was admitted to prove, that the testator declared, that it was his intention to leave the lands to the son.<sup>3</sup> So, where a legacy was given to Catharine Earnley, and there was no person of that name, but the legacy was claimed by Gertrude Yeardley, parol proof was admitted, that the testator's voice was very low when the scrivener wrote the will, that he usually called Gertrude by the name of Gatty, and had declared, that he would do well by her in his will; and, thereupon, the legacy was awarded to her.<sup>4</sup> Indeed, wherever a description is given of a particular person or thing, which is applicable to more than one person or thing, parol evidence is admissible to show the person or thing actually intended.<sup>5</sup> Yet when a descrip-

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<sup>1</sup> *Lapham v. Whipple*, 8 Metcalf, R. 59; *Brigham v. Rogers*, 17 Mass. R. 573; *Seago v. Deane*, 4 Bing. R. 459; *Franklin v. Long*, 7 Gill & Johns. 407.

<sup>2</sup> *Lapham v. Whipple*, 8 Metcalf, R. 59.

<sup>3</sup> *Jones v. Newman*, 1 W. Black. 60. See, also, *Blagge v. Miles*, 1 Story, R. 427.

<sup>4</sup> *Beaumont v. Fell*, 2 P. Wms. R. 140. See, also, *Greenleaf on Evid.* 335, § 291, and note upon this case; *Hampshire v. Peirce*, 2 Ves. sen. 216; *Thomas v. Thomas*, 6 T. R. 671. See *Doe v. Carpenter*, 1 Eng. Law & Eq. R. 307; *Nightingall v. Smith*, 1 Excheq. R. 879; *Morrell v. Fisher*, 4 Excheq. R. 591; *Doe v. Hubbard*, 15 Q. B. R. 227.

<sup>5</sup> *Beaumont v. Fell*, 2 P. Wins. R. 140; *Doe d. Westlake v. Westlake*, 4 Barn. & Ald. R. 57; *Still v. Hoste*, 6 Madd. R. 192; *Hodgson v. Hodgson*, 2 Vern. R. 593.

tion of any person or thing is entirely inapplicable to the subject intended, or said to be intended thereby, evidence cannot be given to prove the particular person or thing to which the testator intended to refer.<sup>1</sup>

§ 673. But if a description, though false in part, be rendered sufficiently certain by the extrinsic circumstances, evidence may be given of them, so as to explain the will. Thus, if a testator should devise his *black* horse, having, in fact, only one horse, which is *white*, or his *freehold* houses, when he has only *leasehold* houses; evidence might be given of such fact to prove that the terms used were the result of mistake.<sup>2</sup> So, also, where certain property was devised to "the four children," evidence was held to be admissible that the testatrix meant the four children by a second marriage.<sup>3</sup>

§ 674. Upon the same principle, parol evidence of usage is permitted "*to annex incidents*" as it is termed; that is, to show those incidents and accessories, which impliedly accompany the subject-matter of the agreement.<sup>4</sup> Thus, a lessee, by deed, may introduce evidence of a local custom of the country, by which he is entitled to an away-going crop, although no such right be reserved in the deed;<sup>5</sup> for the custom does not contradict the express provisions of the deed, but only supplies evidence of the intention of the parties, in respect to an implied and incidental right growing out of the contract. So, also, many conditions are affixed by mercantile usage to the taking of promissory notes and bills of ex-

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<sup>1</sup> 1 Greenl. on Evid. § 290.

<sup>2</sup> *Door v. Geary*, 1 Ves. sen. 255; *Day v. Trig*, 1 P. Wms. R. 286; *Thomas v. Thomas*, 6 T. R. 637.

<sup>3</sup> *Hampshire v. Peirce*, 2 Ves. sen. 216. See, also, *Thomas v. Thomas*, 6 T. R. 671.

<sup>4</sup> 1 Greenl. on Evid. § 294.

<sup>5</sup> *Wigglesworth v. Dallison*, 1 Doug. 201; *Hughes v. Gordon*, 1 Bligh, 287; *Senior v. Armitage*, Holt's N. P. Cas. 197; *Hutton v. Warren*, 1 Mees. & Welsb. 466; *White v. Sayer*, Palm. 211.

change, and the usages of banks, known to the parties to a contract, are recognized as proper evidence to explain the intention of the parties.<sup>1</sup> But no evidence will be admitted of any custom, which is inconsistent with the express terms of the contract itself.<sup>2</sup>

§ 675. Parol evidence will also be admitted to show, that an instrument is void, and never had any legal existence or binding force. Thus fraud, illegality of the subject-matter, duress, incapacity either in fact or in law, and whatever would vitiate the contract, *ab initio*, may be given in evidence to invalidate a written contract.<sup>3</sup>

§ 676. So, also, recitals of facts in an instrument, may be contradicted or explained, where the party is not estopped to deny them. As, for instance, where a charter-party was dated February 6th, and conditioned, that the ship should sail on or before February 12th, parol evidence was admitted to show, that it was not executed until after the day, upon which she was to sail, and that the condition was therefore waived.<sup>4</sup> So, also, parol evidence is admissible to prove, that a strict compliance with the terms of the contract, or with certain

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<sup>1</sup> *Blanchard v. Hilliard*, 11 Mass. 85; *Renner v. Bank of Columbia*, 9 Wheat. 581; *Bank of Washington v. Tripplett*, 1 Peters, Sup. C. R. 25; *City Bank v. Cutter*, 3 Pick. 414.

<sup>2</sup> *Yeats v. Pinn*, Holt's N. P. C. 95; *Holding v. Pigott*, 7 Bing. 465, 474; *Blackett v. Royal Exch. Ass. Co.* 2 Cromp. & Jerv. 244.

<sup>3</sup> 2 Starkie on Evid. 340; 1 Greenl. on Evid. § 284, and cases cited; *Buckler v. Millerd*, 2 Vent. 107; *Stouffer v. Latshaw*, 2 Watts, 165; *Van Valkenburgh v. Rouk*, 12 Johns. 338; *Webster v. Woodford*, 3 Day, 90; *Barrett v. Buxton*, 2 Aik. 167; *Goodwin v. Hubbard*, 15 Mass. 219; *Boyce v. Grundy*, 3 Peters, 219; *Johnson v. Miln*, 14 Wend. 195; *Tayloe v. Riggs*, 1 Peters, 591.

<sup>4</sup> *Hall v. Cazenove*, 4 East, 477; *Tait on Evid.* 332; *Breck v. Cole*, 4 Sandf. 79; *Abrams v. Pomeroy*, 18 Ill. 133; unless the date is made a part of the agreement itself, as it is in a note payable sixty days after date; *Joseph v. Bigelow*, 4 Cush. 82.

legal requisitions was waived. Thus, a waiver of notice by the maker or indorser of a promissory note may be proved; or a change of the place of presentment; or an enlargement of the time; or a total remission of the whole claim by the holder. So, also, parol evidence may be given to prove an entirely new agreement in substitution of the original, or in addition to it, or to prove an insufficient or illegal consideration.<sup>1</sup>

§ 677. There are two species of ambiguity, namely,—that which is apparent on the face of the instrument, and which cannot be rendered certain, by the evidence of collateral facts and surrounding circumstances, admissible under the rules of construction, and which is called *ambiguitas patens*;<sup>2</sup> and that, which, although apparently certain and without ambiguity, for any thing that appears upon the face of the deed or instrument, is rendered ambiguous by extrinsic and collateral matter, out of the deed, which is called *ambiguitas latens*. A patent ambiguity cannot be explained by parol evidence;<sup>3</sup> or, in the words of Lord Bacon: “*Ambiguitas patens* is never holden by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so in effect, that to pass without deed, which the law appointeth shall not pass but by deed.” Where the language

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<sup>1</sup> Story on Agency, § 79, § 80; Keating *v.* Price, 1 Johns. Cas. 22; Mills *v.* Wyman, 3 Pick. 207; Greenleaf on Evid. § 304; 1 Phil. & Am. on Evid. 757; Ballard *v.* Walker, 3 Johns. Cas. 60; Pothier on Oblig. pt. 3, ch. 6, art. 2, n. 636; Munroe *v.* Perkins, 9 Pick. 298; Lattimore *v.* Harsen, 14 Johns. 330; White *v.* Parkin, 12 East, 578; Hotham *v.* East Ind. Co. 1 T. R. 638; Blood *v.* Goodrich, 9 Wend. 68; Youqua *v.* Nixon, 1 Peters, C. C. R. 221.

<sup>2</sup> 1 Greenleaf on Evid. § 297, § 300; 1 Phil. Evid. ch. 10.

<sup>3</sup> Doe *v.* Westlake, 4 Barn. & Ald. 57; Hiscocks *v.* Hiscocks, 5 Mees. & Welsb. 363; Cheyney's Case, 5 Co. R. 68; Strode *v.* Russel, 2 Vern. 624; Harris *v.* Bishop of Lincoln, 2 P. Wms. 136; Hitchin *v.* Groom, 5 Man. Grang. & Scott, 520.

descriptive of property or persons is uncertain and obscure, it is a latent ambiguity, which can be explained by evidence. But where the *intention* of the party is ambiguously expressed, but the property or persons clearly described, it is a patent ambiguity, and parol evidence will not be allowed. "Therefore, if a man give land to I. D., and I. S., *et hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment, to whether of them the intention was, the inheritance should be limited. But if it be *ambiguitas latens*, then otherwise it is; as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all. But if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter of fact; and, therefore, it shall be holpen by averment whether of them it was, that the party intended should pass."<sup>1</sup>

§ 678. In the case of a latent ambiguity the actions of the parties previous to and contemporaneous with the contract are admissible to explain it. As where a bargain is made for wheat, generally, without stating the quality, parol evidence may be given, that the previous usage of the parties was to furnish wheat of a particular quality.<sup>2</sup> So, also, a receipt for money may be explained, by showing, that something short of the terms was intended; it being conclusive only as to the amount paid, and not being evidence of a contract, but only of payment.<sup>3</sup>

§ 679. Ambiguity of language is, however, to be distinguished from unintelligibility and inaccuracy. A word may often be unintelligible to one person, when it is intelligible to

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<sup>1</sup> Bacon's Law Tracts, p. 99, 100. See, also, Morris *v.* Edwards, 1 Ham. 80; 2 Starkie on Evid. 516.

<sup>2</sup> 1 Powell on Cont. 372, 384; Graves *v.* Key, 3 B. & Ad. 313.

<sup>3</sup> Tucker *v.* Maxwell, 11 Mass. R. 143; Johnson *v.* Johnson, Ibid. 359, 363; Johnson *v.* Weed, 9 Johns. 310; Putnam *v.* Lewis, 8 Ibid. 389; Babcock *v.* May, 4 Ham. 346; Wilkinson *v.* Scott, 17 Mass. 249.

another, and may be exceedingly inaccurate, without being ambiguous.<sup>1</sup> Thus, in the will of Nollekins, the sculptor, "all the marble in the yard, the tools in the shop, bankers, *mod*, tools for carving," were devised to Alex. Goblet. A controversy arose on the word "*mod*," which, although inaccurate, and to inexperienced persons, perhaps, unintelligible, was recognized by sculptors as a common abbreviation for *models*, and such the court decided to be its meaning.<sup>2</sup> Words cannot be said to be ambiguous, unless their signification seem doubtful and uncertain to persons of competent skill and knowledge to understand them.<sup>3</sup>

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<sup>1</sup> Wigram on Interpretation of Wills, 174, 175; pl. 200, 201, 203, 204; 1 Greenleaf on Evid. § 298.

<sup>2</sup> Goblet *v.* Beechey, 3 Sim. 24; Wigram on the Interpretation of Wills, p. 179, 185.

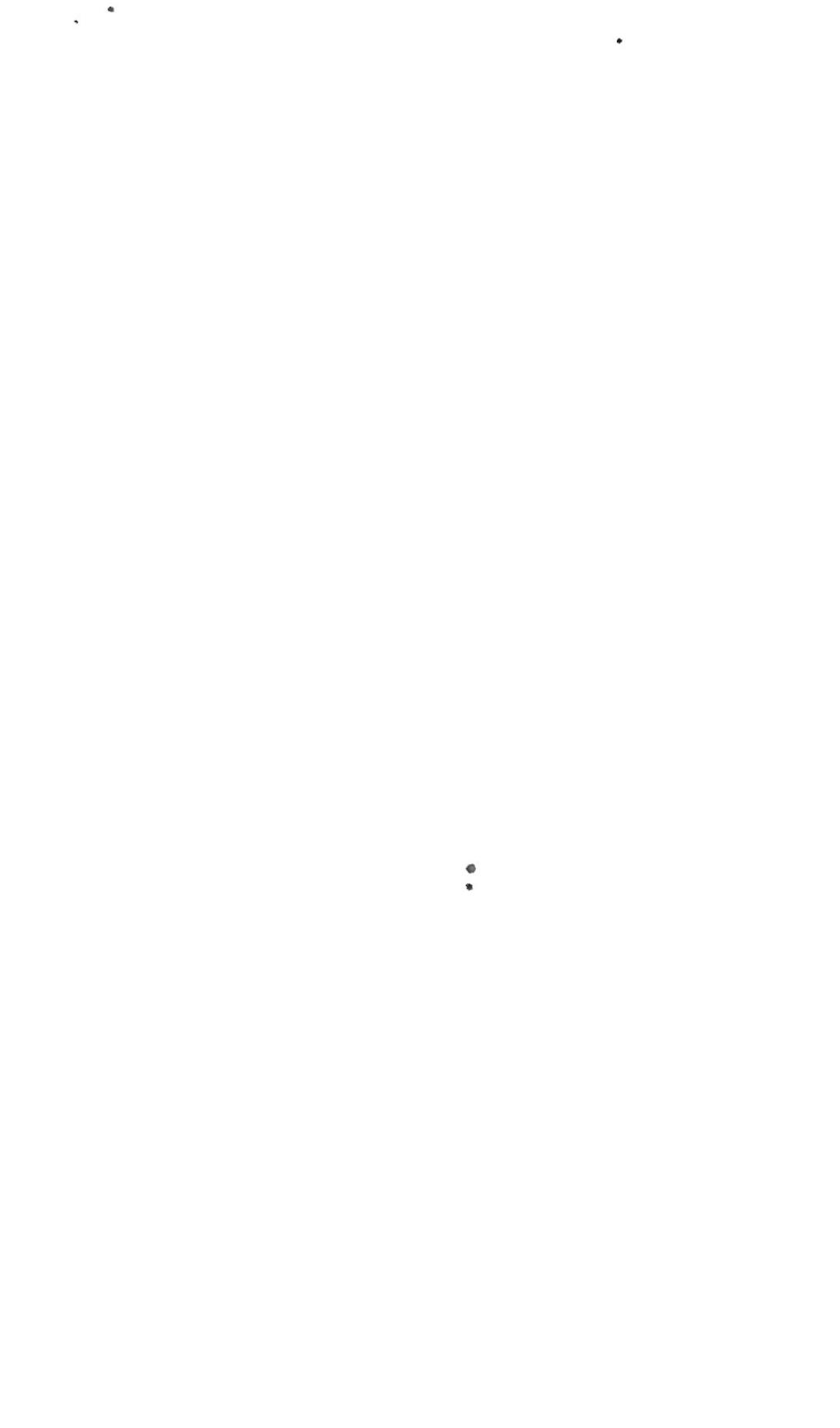
<sup>3</sup> 1 Greenleaf on Evid. § 298.



## PART II.

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### PARTICULAR CONTRACTS.



## PARTICULAR CONTRACTS.

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### CHAPTER I.

#### PRELIMINARY.

§ 680. HAVING now discussed the law as applicable to the subject of contracts, in general, the next branch of the subject which we propose to consider is the law applicable to Particular Contracts, as modified by the peculiar relationship of the parties, and the nature and object of their agreement. This we shall divide into the following heads: 1st. Bailments; 2d. Sale and Warranty; 3d. Guaranty; 4th. Landlord and Tenant; 5th. Master and Servant.

§ 681. It is not within the scope of the present treatise to give more than a brief outline of the general principles of law which govern in these contracts. Each subject, in itself, would afford ample material for a treatise, equal in bulk to the whole of the present work, if fully and elaborately discussed. The present consideration, therefore, of these subjects, will be necessarily limited, and involve the discussion of general principles, rather than their minute modifications.

## CHAPTER II.

## BAILEMENTS. — DEGREES OF DILIGENCE.

§ 682. A BAILEMENT is a delivery of a chattel, in trust for a specific purpose. Bailments are of three kinds: 1st. *Deposits and Mandates*, in which the trust is for the benefit of the bailor, or of a third person. 2d. *Gratuitous Loans* for use, in which the trust is exclusively for the benefit of the bailee. 3d. *Pledges or Pawns; and Hiring and Letting to Hire*, where the trust is for the benefit of both parties. In the first kind of bailment, where the bailment is for the sole benefit of the bailor, or third person, the law requires only *slight* diligence on the part of the bailee, and makes him answerable only for *gross* neglect. In the second kind, where the bailment is for the sole benefit of the bailee, he is bound to use *great* diligence, and is responsible for *slight* neglect. In the third kind, where the bailment is reciprocally beneficial, the bailee is only bound to exert *ordinary* diligence, and is only responsible for *ordinary* neglect. The measure of great diligence is that which very prudent persons take in regard to their own concerns; the measure of slight diligence is that which careless and inattentive persons give to their own concerns; and the measure of ordinary diligence is that which a man of an average share of prudence bestows upon his concerns. What constitutes diligence in a particular case will also depend upon the nature and value of the bailment; for a man would not, in the exercise of proper diligence, give as much care to the preservation of a bag of meal, as of a bag of gold. So, also, it depends upon the customs of trade, and the course of busi-

ness; as, if it be customary, in a particular trade, to leave coals exposed upon a wharf, without guard, during the night, and coals are so left and stolen, the wharfinger might not be responsible for their loss, though he would be, unless there were such a usage.

§ 682 a. The distinction between different degrees of negligence, which had its foundation in the Roman law, and was thence imported into the English law, has been declared in certain late cases to be too fine to be practicable. Baron Rolfe, on a recent occasion, has stated that he can see no difference between negligence and gross negligence, the one being the same as the other with the addition of a vituperative adjective.<sup>1</sup> And Lord Denman, upon another occasion said: "It may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists.<sup>2</sup> There

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<sup>1</sup> Wilson v. Brett, 11 Mees. & Welsb. 113.

<sup>2</sup> Hinton v. Dibbin, 2 Q. B. 650. See, also, The Steamboat New World v. King, 16 Howard, U. S. R. 474. In this case Mr. Justice Curtis said: "The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. In Storer v. Gowen, 18 Maine R. 177, the supreme court of Maine say: 'How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define.' Mr. Justice Story, (Bailments, § 11,) says: 'Indeed, what is common or ordinary diligence is more a matter of fact than of law.' If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what

certainly are cases where it is difficult to say, whether the conduct of a person comes within the class of negligence or gross negligence; but there are certainly many other cases where no such difficulty could arise, and the distinction between the two classes seems to be quite clear and intelligible. If the mere difficulty of arranging the facts of a particular case under the one class or the other, make the distinction between them too fine to be practicable, does not the same objection exist to the classifications of murder and manslaughter, or assault and aggravated assault, or fraudulent and non-fraudulent representations and concealments? Yet, it has never been supposed that these distinctions were impracticable, merely because of the difficulty of deciding whether the facts of a particular case were within the one or the other of these classes. Suppose, for example, a person intrusted with a packet of bank-notes, or a valuable casket of jewels, should leave it in an unlocked trunk in his chamber at a hotel, and should also omit to lock the chamber door, he might fairly be said to be guilty of negligence, or of what is its correlative, want of strict diligence. But suppose he should leave the package or casket on the table in a public sitting-room of the hotel all night,

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omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty, had better be abandoned.

" Recently the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. *Wilson v. Brett*, 11 Meeson & Wels. 113; *Wylde v. Pickford*, 8 Ib. 443, 461, 462; *Hinton v. Dibbin*, 2 Q. B. 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as *Tracy et al. v. Wood*, 3 Mason, 132, and *Foster v. The Essex Bank*, 17 Mass. R. 479, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law, and on the civil code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See *Toullier's Droit Civil*, 6th vol. p. 239, &c.; 11th vol. p. 203, &c. *Makeldey, Man. Du Droit Romain*, 191," &c. *Austin v. Manchester Railway*, 11 Eng. Law & Eq. R. 513.

could there be any doubt that he would be guilty of a far higher degree of negligence — in a word of gross negligence?<sup>1</sup> And is there no practical distinction between these two cases? A man may be said to be negligent when he omits to do what all agree that a careful and prudent man would have done under the same circumstances. But he may go much further than this, and render himself liable to the imputation of gross negligence by omitting to do what no man paying any heed to his acts would have left undone. Another example may be put. A money-changer who should leave his shop unlocked and unattended in order to do a short errand in the daytime, might fairly be said to be negligent and careless; but is there no clear distinction between negligence such as this and that gross negligence of which he would be guilty, if he should leave his shop open and unattended all night, with all his money lying on the counter? Is it not quite as easy to perceive the distinction in such a case, as it would be in case of an assault, to determine whether it were an aggravated assault or merely a simple assault? Might it not be said with equal justice in both cases, that “one is the same as the other, with the addition of a vituperative adjective?”

§ 683. Bailments are divided into five different classes, namely: 1. Deposits; 2. Mandate; 3. Loan for Use; 4. Pledge or Pawn; 5. Hiring. We shall, therefore, consider these different bailments in order.

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<sup>1</sup> See *Armistead v. White*, 6 Eng. Law and Eq. R. 349.

## CHAPTER III.

## DEPOSITS.

§ 684. A DEPOSIT is a bailment of a thing for custody, without compensation.<sup>1</sup> *Depositum est quod custodiendum alicui datum est.* A deposit differs from the *mutuum* of the civil law, in that, in the former case, the identical thing is to be returned, and, in the latter, some equivalent only of the same kind, nature, or quality.<sup>2</sup> A deposit of money with a banking corporation is generally only a *mutuum*, for the bank is to restore, not the same money, but an equivalent sum; though there may be a special deposit, where the specific money is to be restored. The deposit remains the property of the depositor, and the depositary has nothing but the mere possession and custody.

§ 685. A deposit may be made by and between any persons competent to contract, but it can only be made in respect to personal or movable property. Debts, choses in action, and other instruments and evidences of debt, may also be made

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<sup>1</sup> Story on Bailm. § 41; Jones on Bailm. 36, 117; 1 Bell, Comm. p. 257; 1 Dane, Abr. ch. 17, art. 1, § 3; 2 Kent, Comm. Lect. 40, p. 560, 4th ed.; Erst. Ins. B. 3, tit. 1, § 26; Pothier, Traité de Depot, n. 1; Morceau & Carlton's Partidas, 5, tit. 3, l. 1.

<sup>2</sup> Just. Inst. Lib. 3, tit. 15; Dig. Lib. 44, tit. 9, l. 1, § 2; Dig. Lib. 12, tit. 1, l. 2, § 2; Pothier, Pand. Lib. 12, tit. 1, n. 9, 10; 1 Bell, Comm. § 197, 257, 258, 5th ed.; Story on Bailm. § 47.

the subject of this bailment.<sup>1</sup> It is by no means necessary for the depositor to have a legal right or title to the deposit. If he have possession thereof it will be sufficient; and he may, in such case, recover against every one but the rightful owner.<sup>2</sup> If his possession be tortious, the rightful owner may repossess himself of the deposit, wherever it be. If, therefore, a person receive an article upon deposit, which belongs rightfully to himself; or which, subsequently, during the time that it remains in his hands, becomes his property, he may appropriate it, unless an injury is thereby done to the rights of a third person.<sup>3</sup>

§ 686. A delivery of the deposit must be made, either to the depositary, or to some person having authority to receive it for him. Thus, a delivery to an agent is sufficient to bind his principal, if within the scope of his authority, or with the approbation of the principal; and not otherwise.

§ 687. The essential characteristics of a deposit are, that it be gratuitous and voluntary, and have for its object the keeping of the thing, and that the specific thing is to be returned. In the first place, it must be gratuitous; for, if compensation be given, it is a bailment of hiring, (*locatio custodiae*), and not a deposit. But if no compensation be given for the *keeping*, the bailment may be a deposit, although rent be paid for the *room* in which it is placed. The question is, whether the bailee receives a recompense for his care and attention in

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<sup>1</sup> Story on Bailm. 51; *Arnold v. Jefferson*, 1 Lord Raym. 275; 1 Roll. Abr. 5, k. 3; 1 Bell, Comm. § 199, 4th ed., 258, 5th ed.

<sup>2</sup> *Armory v. Dalamirie*, 1 Str. 505; *Rooth v. Wilson*, 1 B. & Ad. 59; Com. Dig. Action on the Case, Trover, B. D.; 2 Saund. 47, and note by Williams; 2 Kent, Comm. Lect. 40, p. 566, 567, 4th ed.; *Learned v. Bryant*, 13 Mass. 224; Pothier, *Traité de Depot*, n. 51.

<sup>3</sup> *Hartop v. Hoare*, 3 Atk. 44; *Taylor v. Plumer*, 3 M. & S. 562; 2 Story, Eq. Jurisp. § 1257 to 1260; *Mills v. Graham*, 4 B. & P. 140; Story on Bailm. § 52, § 53, § 58; Dig. Lib. 16, tit. 3, l. 15; Pothier, *Traité de Depot*, n. 4.

*keeping the article, and not whether he is indemnified for the space which it occupies.*

§ 688. So, also, the bailment must ordinarily be voluntarily assumed by the bailee. No person can be forced to become a depositary against his will, except in cases of extraordinary peril or danger, where he is made a bailee from the exigencies of the case,—as in case of fire and shipwreck ; or where the bailment is made by accident,—as if lumber, floating in a river, should drift upon his land,—or fruit, overhanging his wall, should drop upon his land.<sup>1</sup> His consent will be inferred from circumstances, and need not be expressly given. Thus, if a creditor hold a pledge, after payment of the debt for which it was given, he holds it as a deposit.<sup>2</sup> So, also, a person may assume the liabilities of a depositary by taking charge of property which he finds ; he is not, however, bound to assume any custody of it ; but if he do, he becomes a depositary, and is liable for any loss resulting from gross or wilful negligence.<sup>3</sup> Where a person becomes a depositary by implication, as by finding, and he assumes necessary labor or expense in preserving it, he is entitled to a remuneration therefor.<sup>4</sup> Thus, if a horse be found, and the finder be put to trouble and expense in discovering the owner, or feeding the horse, he would be entitled to a recompense therefor, which constitutes an exception allowed on peculiar grounds.

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<sup>1</sup> 1 Dane, Abr. ch. 77, art. 2; 2 Kent, Comm. Lect. 40, p. 560, 4th ed.; *Lafarge v. Morgan*, 11 Martin, 462; *Foster v. Essex Bank*, 17 Mass. 500; *Edson v. Weston*, 7 Cowen, R. 278; *Doorman v. Jenkins*, 2 Ad. & El. 256; Story on Bailm. § 11, 23, 62, 63, et seq. 337; Jones on Bailm. 31, 32, 46, 47, 82, 83, 122, 123; *Mytton v. Cock*, 2 Str. 1099; *Coggs v. Bernard*, 2 Lord Raym. 909, 914; *Tompkins v. Saltmarsh*, 14 Serg. & R. 275.

<sup>2</sup> *Foster v. Essex Bank*, 17 Mass. 479; Story on Bailm. § 55, 60; *Lethbridge v. Phillips*, 2 Stark. 544.

<sup>3</sup> *Noy*, ch. 43; *Doct. & Stu. Dial.* 2, ch. 38; *Isaack v. Clark*, 2 Bulst. R. 312; *Domat*, Lib. 2, tit. 9, § 2, No. 2.

<sup>4</sup> *Nicholson v. Chapman*, 2 II. Black. R. 258.

§ 689. Again, the specific thing deposited must be restored, for if it be surrendered for use and consumption, and the contract contemplate the return only of its equivalent, the transaction becomes a different species of bailment, and is a commutation or loan for use and consumption, involving different duties and responsibilities.<sup>1</sup> Thus, if money be deposited with a banker with the understanding that the identical coins or notes are to be returned, he is a depositary; but if it be understood that he is to be at liberty to use it, and only to restore an equivalent value in other coins or notes, he is not a simple depositary, but a borrower.<sup>2</sup>

§ 690. We have already seen that a depositary is liable for gross negligence only.<sup>3</sup> The question, what is gross negligence, is generally a matter of fact for the jury, and not a question of law for the court.<sup>4</sup> It is varied by the nature and value of the bailment, the particular circumstances of each case, and often by the relation of the parties to each other. But, although a depositary is only bound to use slight diligence, he is nevertheless bound to take reasonable care of the bailment. If he take the same care of the goods deposited as his own, it will create a presumption in his favor; but this presumption is not conclusive. If his negligence with regard to his own concerns be gross, the mere fact that he has kept the deposit in the same place, or with the same care, as his own property, will not exempt him from liability. Gross negligence at the common law is wholly distinct from fraud, and may have been committed with perfectly honest intentions; but, at the civil law, gross negligence and fraud are considered as nearly

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<sup>1</sup> Robinson *v.* Ward, 1 Ry. and Mood. 276; Wren *v.* Kirton, 11 Ves. R. 377; Rocke *v.* Hart, 11 Ves. R. 61; Massey *v.* Banner, 4 Madd. R. 418; s. c. 1 Jack. & Walk. 241; post, *Loan for use.*

<sup>2</sup> *Ibid.*

<sup>3</sup> Ante, § 682. See, also, Green *v.* Hollingsworth, 5 Dana, R. 173; Bakeswell *v.* Talbot, 4 Dana, R. 216; Chase *v.* Maberry, 3 Harring. R. 266.

<sup>4</sup> See Doorman *v.* Jenkins, 2 Ad. & El. 256.

equivalent to each other.<sup>1</sup> Good faith, however, is no defence to a depositary, if he have been guilty of gross negligence. Thus, where a painted cartoon was deposited, and was kept so near a damp wall, next a stable, that it peeled ; it was held, that the bailee was liable for gross negligence.<sup>2</sup> So, where a bailee put his own money, and money deposited in the same cash-box, in his tap-room, and all was stolen ; it was held to be gross negligence.<sup>3</sup> So, also, on a deposit of money to be kept without recompense, if the bailee attempt, without authority, to transmit the money to the bailor, at a distant point, by mail or private conveyance, he renders himself liable in case the money is lost.<sup>4</sup>

§ 691. But if a depositary have not been guilty of gross negligence, he will not be responsible for any accident which occurs ; for his contract is to keep the bailment, and not to keep it *safely*. If, therefore, there be any losses by theft, or fire, he will not be responsible, unless the theft or fire were occasioned by his own gross negligence.<sup>5</sup>

§ 692. The contract of a depositary may, however, be nar-

<sup>1</sup> Dig. Lib. 16, tit. 8, l. 32 ; Id. Lib. 50, tit. 17, l. 23 ; Lib. 13, tit. 6, l. 5 ; 2 Inst. Lib. 3, tit. 15 ; 3 Pothier, Pand. Lib. 16, tit. 3, n. 25 ; 1 Domat, B. 1, tit. 7, § 5, art. 20 ; Story on Bailm. § 65, 66.

<sup>2</sup> Mytton v. Cock, 2 Str. 1099.

<sup>3</sup> Doorman v. Jenkins, 2 Ad. & El. 256 ; s. c. 4 Nev. & Man. 170. Mr. Justice Taunton in that case said, " What care does he (the defendant) exercise ? He puts it (the money) together with money of his own, *which I think perfectly immaterial*, into the till of a public-house." See, also, Story on Bailm. § 64, 64 a, 67 ; Tracy v. Wood, 3 Mason, R. 132 ; Clarke v. Earnshaw, 1 Gow, R. 30 ; Pothier, Traité de Depot, n. 23 to 29 ; 2 Kent, Comm. Lect. 40, p. 564 ; Rooth v. Wilson, 1 B. & Ald. 59 ; The William, 6 Rob. 316 ; Wilson v. Brett, 11 M. & W. 113.

<sup>4</sup> Stewart v. Frazier, 5 Alab. R. 114.

<sup>5</sup> Coggs v. Bernard, 2 Lord Raym. 909 ; The King v. Hertford, 2 Show. 172 ; Brook, Abr. tit. Bailment, 7 ; 1 Dane, Abr. ch. 17, art. 7 ; Story on Bailm. 72, 73, 74, 190 ; Nelson v. Macintosh, 1 Stark. 238 ; Mein v. West, T. U. P. Charlton, R. (Geo.) 170 ; Montieth v. Bissell, Wright, (Ohio) R. 411.

rowed or enlarged by special agreement; as, if the depositor designate the place in which the bailment shall be kept, the depositary will not be responsible, although the place be actually unsafe, and the goods be thereby lost. But, in case of loss, he who would avail himself of the benefit of such a special contract, must establish it by suitable proof, either directly, or from collateral circumstances.<sup>1</sup>

§ 693. A depositary is always responsible, when he has not exercised proper diligence. But he is only bound to exercise a diligence proportioned to his knowledge. And, if articles be deposited in his hands, of the value of which he is ignorant, he need only exercise slight diligence. But, if the articles deposited be known by him to be valuable, he would be bound to a diligence proportioned to their value. But, if the value of the goods be studiously concealed from the depositary, in order to induce him to receive the bailment, when he would not otherwise have undertaken to keep it,—as if jewels be given him in a box or casket,—it will be deemed to be a fraud upon him, and he will only be responsible for the apparent and ostensible value of the goods; that is, in the illustration, of the mere box or casket, without its contents.<sup>2</sup> The same degree of diligence is required of the bailee, in respect of a necessary or an accidental bailment. So, also, if a person find an article, he is bound to take reasonable care of it.<sup>3</sup>

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<sup>1</sup> Story on Bailm. § 74, 79; Dig. Lib. 50, tit. 17, § 23; Jones on Bailm. 47, 48; Bradish *v.* Henderson, 1 Dane, Abr. ch. 17, art. 11, § 4; Nelson *v.* Macintosh, 1 Stark. R. 238.

<sup>2</sup> Jones on Bailm. p. 38, 39; Coggs *v.* Bernard, 2 Lord Raym. 909, 914, 915; Story on Bailm. § 77, 78, 79; Bonion's Case, Pasch. 8 Edw. 2; Dig. Lib. 16, c. 1, § 41.

<sup>3</sup> 1 Bac. Abr. Bailment, D.; Mosgrave *v.* Agden, Owen, 141; Coggs *v.* Bernard, 2 Lord Raym. 909; Noy, Maxims, A. 43, p. 92; Doct. & Stud. Dial. 2, ch. 38; Story on Bailm. § 85, 86; Comyn, Dig. Trover, E.; Mulgrave *v.* Ogden, Cro. Eliz. 219; Vandrink *v.* Archers, 1 Leon. 222; Isaack *v.* Clarke, 2 Bulst. 306, 312; s. c. 1 Roll. R. 126, 130.

§ 694. If an involuntary bailment be created upon a piece of land, by the fault of the owner of the land, the owner of the goods may enter and retake them. If it be created by the fault of the owner of the goods, he may not. If it be created by the fault of both, he may. And if it be created by a stranger, the owner of the land must be connected with the stranger by a demand and refusal, and then he may. If the owner of the land improperly refuse, upon the request of the owner of the goods, to be permitted to remove them, it will be considered as a conversion, for which trover will not lie.<sup>1</sup>

§ 695. The general rule is, that a depositary has no right to use the thing deposited; and if he do, and the deposit is thereby lost or injured, he is bound to make good the loss;<sup>2</sup> but this rule is subject to modifications. Thus, if the use would be for the benefit of the depositor, or the advantage of the deposit, his assent thereto will be presumed. So, also, whenever it would apparently be indifferent to the owner whether the thing were used or not, and there are no circumstances tending to negative the presumption of assent, the thing may be used. Thus, if a setter should be deposited, assent to the proper use of him for sporting would be fairly presumed; because it would be for the benefit of the owner that he should be kept in training. So, where a picture is deposited, it would be fairly presumed to be a matter of indiffer-

<sup>1</sup> Bro. Abr. Trespass, pl. 186; 2 Roll. Abr. 505, pl. 9; Houghton *v.* Butler, 4 T. R. 365; Chapman *v.* Thumblethorp, Cro. Eliz. 829; Am. Jur. vol. 20, p. 321; Beckwith *v.* Shordike, 4 Burr. 2092; Deane *v.* Clayton, 7 Taunt. 489; Dovaston *v.* Payne, 2 H. Bl. 527; Nicholson *v.* Chapman, 2 H. Bl. 254; Brown *v.* Cook, 9 Johns. 361; Chancellor of Oxford's case, 10 Co. R. 56; Cranch *v.* White, 1 Bing. N. C. 414; Wilson *v.* Anderton, 1 B. & Ad. 450; Green *v.* Dunn, 3 Camp. 215 *n.*; Gunton *v.* Nurse, 2 Brod. & Bing. 447; Verrell *v.* Robinson, 2 Cromp. Mees. & Rose. 495; Philpott *v.* Kelley, 3 Adolph. & El. 106.

<sup>2</sup> Cod. Lib. 4, tit. 34; 3 Dig. Lib. 16, tit. 3, 29; Merry *v.* Green, 7 Mees. & Welsb. 623.

ence, whether it be hung up and shown in the house, or whether it be stored away. But where the use of the deposit would be injurious thereto, the presumption is against the assent of the owner to the use thereof.<sup>1</sup>

§ 696. The identical thing deposited must be returned, as nearly as possible, in the same condition as that in which it was received. If there be any natural increment therefrom, as if the deposit be an animal, and it bring forth young, such increment, also, must be surrendered; and if a part be lost, the remainder must be restored. So, also, if, in consequence of the perishable nature of the deposit, the depositary be compelled to sell it, he must pay to the depositor the proceeds of such sale.<sup>2</sup> If, however, he sell it without necessity, it will be a tortious conversion of the deposit.<sup>3</sup> If he refuse, however, to redeliver the deposit, upon proper demand by the depositor or rightful owner, he renders himself responsible for all losses and injuries resulting from any cause whatsoever, because he holds it wrongfully.<sup>4</sup> A deposit must be returned to the depositor, or his authorized agent, unless he be without title thereto, in which case it must be surrendered to the rightful owner.<sup>5</sup> Nor does it make any difference that the bailee has

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<sup>1</sup> Story on Bailm. § 90; Pothier, *Traité de Dépot*, n. 237; Jones on Bailm. 80, 81; *Merry v. Green*, 7 Mees. & Welsb. 623.

<sup>2</sup> Story on Bailm. § 97, 98, 99; Jones on Bailm. 40, 46; *Foster v. Essex Bank*, 17 Mass. 479; *Stanton v. Bell*, 2 Hawks, N. C. Rep. 145; 1 Dane, Abr. ch. 17, art. 1 and 2; *Mytton v. Cock*, 2 Str. 1099; *Rooth v. Wilson*, 1 B. & Ald. 59; 1 H. B. 162; *Game v. Harvie*, Yelv. 50; *Wheatley v. Low*, Cro. Jac. 668; *Coggs v. Bernard*, 2 Lord Raym. 920; 2 Kent, Comm. Lect. 40, p. 566, 567, 4th ed.; Dig. Lib. 16, tit. 3, l. 1, § 23, 24.

<sup>3</sup> *Holbrook v. Wight*, 24 Wend. 169; Jones on Bailm. 70-121; Dane, Abr. ch. 17, art. 14; *Sargent v. Gile*, 8 N. Hamp. 325; Story on Bailm. § 122, 123.

<sup>4</sup> *Nicholson v. Chapman*, 2 H. Bl. 254; *Holbrook v. Wight*, 24 Wend. R. 169; Dane, Abr. ch. 17, art. 14; Pothier, *Traité de Dépot*, n. 33.

<sup>5</sup> Story on Bailm. § 102; Bac. Abr. *Bailment*, A.; *Wilson v. Anderton*, 1 B. & Ad. 450; *Ogle v. Atkinson*, 5 Taunt. 759; *Taylor v. Plumer*, 3 M. & S.

transferred the deposit to a third person; for whether such transference be *bona fide*, as to a second bailee, or *mala fide*, as by sale, the real owner may recover it, wherever it is.<sup>1</sup> If, therefore, a trustee deposit the goods of his *cestui que trust*, and his trust determine before the surrender of the bailment, it may be reclaimed by the *cestui que trust*.<sup>2</sup>

§ 697. Where several depositors make a joint bailment, the bailee is only bound to surrender it, upon the demand of all the bailors; unless it be made by one without the privity of his co-depositors.<sup>3</sup> Where a deposit is made to several joint depositaries, they are severally liable therefor, and are sureties, one for the other. If the persons claiming as depositors have adverse interests, founded in privity of title, as between a first bailee and the bailor, the depositary may compel them to interplead, so as to define the person to whom he is bound to redeliver the bailment. But if the right of the claimants be absolutely adverse, the bailee must defend himself as he may, for he cannot compel them to interplead.<sup>4</sup>

§ 697 a. If the bailor be not the rightful owner of the deposit, the depositary may deliver it to the rightful owner; and

562; *Hardman v. Willecock*, 9 Bing. R. 382, note; *King v. Richards*, 6 Wharton, 418; *Bates v. Stanton*, 1 Duer, 79.

<sup>1</sup> *Wilkinson v. King*, 2 Camp. 335; *Loeschman v. Machin*, 2 Stark. 311; 2 Saund. 47, b, Williams & Patterson's note e; *Hartop v. Hoare*, 3 Atk. 44; *Hurd v. West*, 7 Cow. 752; 1 Roll. Abr. Detinue, C. pl. 46; Story on Bailm. § 104, 105; *Isaack v. Clarke*, 2 Bulstrode, 306, 312; Bac. Abr. Bailment, D.; *Gosling v. Birnie*, 7 Bing. 339; *Ogle v. Atkinson*, 5 Taunt. 759; *Wilson v. Anderton*, 1 B. & Ad. 450; *Whittier v. Smith*, 11 Mass. 211; *Learned v. Bryant*, 13 Mass. 224.

<sup>2</sup> Story on Bailm. § 109; Pothier, *Traité de Depot*, n. 50.

<sup>3</sup> *May v. Harvey*, 13 East, 197; 1 Roll. Abr. Interpleader, E.; Brook. Abr. Enactment, pl. 4; 2 Kent, Comm. 566; Story on Bailm. § 114, 116.

<sup>4</sup> Story on Bailm. § 110; 2 Kent, Comm. Lect. 40, p. 567; *Rich v. Aldred*, 6 Mod. 216; *Isaack v. Clarke*, 2 Bulst. 306; 2 Story, Eq. Jurisp. § 801-823; *Cooper*, Eq. Pl. 45-50; *Viner*, Abr. Interpleader, L. M. N.; Story on Agency, § 217; 7 Dane, Abr. ch. 226, art. 9, § 4.

proof of such delivery will be a complete defence to an action by the bailor.<sup>1</sup> And, correlatively, the true owner is always entitled to recover from the bailee any property belonging to him.<sup>2</sup> But a delivery by the bailee over to the bailor before he is informed of the claim of the true owner, is a good defence to such claim.<sup>3</sup>

§ 698. If no place be specified at which the bailment is to be redelivered, it may be returned at the place where it happens to be at the time, or where it ought to be kept; and an offer to deliver it at either place, or at any reasonable place, is sufficient.<sup>4</sup> But a demand may be made anywhere.<sup>5</sup>

§ 699. If any necessary expenses be incurred by the depositary in the preservation of the deposit, he is entitled to a reimbursement therefor, and may recover them in an action; and upon principle, it would seem that he ought to have a lien upon the deposit.<sup>6</sup> Nor does it matter, in respect to this rule, whether he be a depositary by special agreement, or whether he be rendered so by the circumstances of the case. And if he find an article, and undertake to keep it, and in so doing incur expense, he has the same right to be reimbursed of such expense, as if the article had been placed in his hands by the owner on deposit.<sup>7</sup> So, also, if a certain reward be offered for

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<sup>1</sup> King *v.* Richards, 6 Whart. R. 418.

<sup>2</sup> Cheesman *v.* Excell, 4 Eng. Law & Eq. R. 438; Bates *v.* Stanton, 1 Duer, R. 79; Pitt *v.* Albritton, 12 Iredell, R. 77.

<sup>3</sup> Nelson *v.* Iverson, 17 Ala. R. 216.

<sup>4</sup> 2 Kent, Comm. Lect. 39, p. 568, 4th ed.; Scott *v.* Crane, 1 Conn. R. 255; Higgins *v.* Emmons, 5 Conn. 76; Mason *v.* Briggs, 16 Mass. 453; Slingerland *v.* Morse, 8 Johns. 474; Story on Bailm. § 117, 118, 261, and note; Aldrich *v.* Albee, 1 Greenl. 120.

<sup>5</sup> Dunlap *v.* Hunting, 2 Denio, R. 643.

<sup>6</sup> Nicholson *v.* Chapman, 2 H. Black. 254; Story on Bailm. 121, 121 a. But see, as to right of lien, Binstead *v.* Buck, 2 W. Black. R. 1117.

<sup>7</sup> Ibid.

goods which he has found, he would have a lien upon the goods for the reward.<sup>1</sup>

§ 700. Where personal property is attached upon mesne process, it is, in some of the States, a common practice to bail the goods to some friend of the debtor, called the receiptor, with an agreement on his part, that they shall be forthcoming in time to respond to the judgment. The officer making such attachment has a special property in the goods, and may reclaim them at any time, and maintain the appropriate actions to enforce his right.<sup>2</sup> The creditor, however, has no such interest.<sup>3</sup> The officer is responsible for a redelivery of the property, upon dissolution of the attachment, or upon satisfaction of the creditor's claim in any way; and, if he deliver them to the bailee or debtor, and a loss ensue, he is liable therefor.<sup>4</sup> He would certainly be responsible for gross negligence, and probably, also, for *ordinary* negligence, because he is a bailee for a compensation.<sup>5</sup> For all expenses incurred in keeping the property, however, he is to be reimbursed by the creditor.<sup>6</sup>

§ 700 a. In respect to the question whether the receiptor,

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<sup>1</sup> Wentworth *v.* Day, 3 Metcalf, R. 352. And see Wilson *v.* Guyton, 8 Gill, R. 213.

<sup>2</sup> Ladd *v.* North, 2 Mass. 514; Perley *v.* Foster, 9 Mass. 112; Whittier *v.* Smith, 11 Mass. 211; Barker *v.* Miller, 6 Johns. 195; Pierce *v.* Strickland, 2 Story, R. 292; Warren *v.* Leland, 9 Mass. 265; Gibbs *v.* Chase, 10 Mass. 125; Gates *v.* Gates, 15 Mass. 311; Brownell *v.* Manchester, 1 Pick. 232; Badlam *v.* Tucker, 1 Pick. 389; Story on Bailm. § 124, 125, et seq.

<sup>3</sup> Ladd *v.* North, 2 Mass. 514; Blake *v.* Shaw, 7 Mass. 505; Badlam *v.* Tucker, 1 Pick. 389; Knap *v.* Sprague, 9 Mass. 258; Jewett *v.* Torrey, 11 Mass. 219; Lyman *v.* Lyman, 11 Mass. 317.

<sup>4</sup> Phillips *v.* Bridge, 11 Mass. 242; Tyler *v.* Ulmer, 12 Mass. 163; Congdon *v.* Cooper, 15 Mass. 10.

<sup>5</sup> Burke *v.* Trevitt, 1 Mason, 96, 100; Browning *v.* Hanford, 5 Hill, R. 588; Story on Bailm. § 130.

<sup>6</sup> Sewall *v.* Mattoon, 9 Mass. 535; Tyler *v.* Ulmer, 12 Mass. 163, 168; Phelps *v.* Campbell, 1 Pick. 59, 61.

under an attachment upon mesne process, has such an interest in the property as to enable him to maintain trover against a wrongdoer, the authorities are contradictory. In Massachusetts and New York it has been held that he cannot, because he has a mere custody;<sup>1</sup> but in Vermont<sup>2</sup> and New Hampshire<sup>3</sup> the rule is different.

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<sup>1</sup> Ludden *v.* Leavitt, 9 Mass. 104; Warren *v.* Leland, 9 Mass. 265; Commonwealth *v.* Morse, 14 Mass. 217. Whether this doctrine would apply as against a wrongdoer, *quære*. Waterman *v.* Robinson, 5 Mass. 303. See Miller *v.* Adsit, 16 Wend. R. 335; Year-Book, 21 Henry 7, 14 b, pl. 23.

<sup>2</sup> Thayer *v.* Hutchinson, 13 Verm. R. 507. In this case Bennett, J., said: "The opinion and charge of the county court, in this case, that the plaintiff was not entitled to recover, no doubt proceeded upon the ground that the plaintiff had no such interest in the property in question, as would enable him to maintain trover. It is true that, in Massachusetts, it has been held that the receptor of chattels attached has but a mere *naked possession* of them, as the servant of the officer, without any legal interest, and that, therefore, he cannot maintain any action against any one who shall take them out of his possession. Ludden *v.* Leavitt, 9 Mass. R. 104; Warren *v.* Leland, Id. 265; Commonwealth *v.* Morse, 14 Mass. R. 217. The same principle has been recognized in other cases in that State. In Dillenback *v.* Jerome et al. 7 Cowen, R. 294, the Supreme Court of New York hold the same doctrine, and fully indorse the Massachusetts cases. See, also, Barker *v.* Miller, 6 Johns. R. 196; and Norton *v.* People, 8 Cowen, R. 137. The principle of these cases is directly opposed to the present action, and they are the opinions of learned and highly respectable courts. Still we cannot accede to their soundness. The position that a mere *depositary*, or bailee for safe-keeping, has no special property in the deposit, but a custody only, is certainly a doctrine which is inculcated by the most respectable authorities. In addition to the foregoing, I might refer to Hartop *v.* Hoare, 3 Atkyns, R. 44; Southcote's case, 4 Coke, R. 84; Waterman *v.* Robinson, 5 Mass. R. 304; Brownell *v.* Manchester, 1 Pick. R. 232. Still, it is often laid down, by elementary writers, that a *depositary* has a *special* property in the deposit. Blackstone, in his Commentaries, 2d vol. 452, lays it down that the general bailee may vindicate, in his own right, his *possessory interest* against any stranger or third person. Sir William Jones, in his Law of Bailments, says, 'Every bailee has a *temporary, qualified property* in the things of which possession is delivered to him, and has, therefore, a possessory action against a stranger who may damage or purloin them.' A case is cited from the Year-Book, 21 Henry VII., in which Justice Fineax

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\* Hyde *v.* Noble, 13 N. Hamp. R. 494.

is reported to have said, ‘In this case the bailee has a property in the thing; against every stranger, for he is chargeable to the bailor, and for this reason he shall recover against a stranger who takes the goods out of his possession.’ The character of the bailment does not distinctly appear in the report; but, from the statement of the pleadings, it is to be inferred that the bailee was a mere *depositary*. Other cases are to be found in the books, recognizing the same doctrine. But, be this as it may, I do not think it is important, in this case, to determine whether the plaintiff had strictly a *special property* in the articles in question, or not. He is answerable over to the officer for the property, and the extent of his responsibility may be immaterial; and he ought not to be chargeable without having the means of redress. The plaintiff had the lawful possession of the chattels, and whether this was accompanied with a special interest or property in them, or not, it was sufficient to enable the possessor to maintain trover or trespass against any wrongdoer who violates that possession. Fisher *v.* Cobb, 6 Verm. R. 624. The finder of a jewel has such a title to it as will enable him to keep the possession against all persons but the rightful owner, and he may maintain trover for it. Armory *v.* Delamirie, 1 Strange, R. 505; Sutton *v.* Buck, 2 Taunt. R. 303, 309, is to the same effect. Lawrence, J., in the latter case, says, ‘There is enough of property in this plaintiff to enable him to maintain trover against a wrongdoer;’ and Chambre, J., says, ‘The plaintiff has possession under the rightful owner, and that is sufficient against a person having no color of right;’ and he says, ‘Even a general bailment, only, for the benefit of the rightful owner, will suffice.’ Burton *v.* Hughes, 2 Bing. R. 173; and Oughton *v.* Seppings, 1 Barn. & Adolph. 241, are to the same effect. But it does not follow that because a depositary or bailee for safe-keeping, who has the actual possession of a chattel, can maintain trover, as well as trespass, against a wrongdoer, who disturbs his possession, he must, therefore, have a special property in the chattel. In Waterman *v.* Robinson, 5 Mass. R. 304, which was replevin, Parsons, Ch. J., in giving the opinion of the court, expressly states that, as the plaintiff had merely the *care of the goods for safe-keeping, and no special property in them*, he could not maintain replevin, which is founded in property either general or special, but might maintain trespass or trover, if his possession was violated. It is generally said that a sheriff, who has seized goods on an attachment, or execution, can maintain trover for them on the ground that he has a *special property* in them. In Giles *v.* Grover, 6 Bligh, R. 277, in the House of Lords, this subject is fully examined. Lord Tenterden, in that case, p. 452, says, ‘These actions,’ that is, actions by sheriffs, ‘are maintainable upon a ground perfectly distinct from the right of property. They are maintainable upon the ground of possession;’ and he adds, ‘Any man in the possession of goods, as bailee, or otherwise, may, in his own name, maintain an action.’ Lord Chief Justice Tindal, in the same case, says, in substance, ‘He who has the legal possession of goods, though not the property, may maintain trover against a wrongdoer, without color of legal title, who cannot dispute the title

of the party in possession.' And he adds, 'It would be a better definition of the sheriff's relation to these goods, to say, 'he has them in his custody under a power to sell them, rather than an *actual interest or property in them*. They are *in custodia legis*, a phrase which plainly distinguishes a mere custody and guardianship of the goods, from a property in them.' Several of the other judges gave the same explanation. Justice Taunton added, 'The sheriff, under the writ, has a mere power to sell, without any interest vested in him, except that which any bailee, who is answerable over, has for his own protection.' If this may be termed an interest, or a special property in the chattel, it is like the interest in the receipt-man. Both are founded upon a liability over to others. It is clear there is no beneficial interest. When we speak of a special property in a chattel, we usually mean some right therein distinct and subordinate to the general owner, as in the case of a pledge. If, by a special property, we mean a subordinate right to control the chattel, arising out of a lawful possession of it, accompanied with a liability over, then it is clear the mere depositary, or bailee for safe-keeping, and the sheriff, who has it *in custodia legis*, have such property. The defendants, in the case before the court, stand as strangers, and have no color of right.

"The fact, that Kidder stated, when the defendants drove away the property, that he took it upon an attachment against Bracket, amounting to nothing. No process was shown; none given in evidence or offered on the trial. The defendants, then, must stand, not only as strangers, but even without any color of right. If, then, we were even to hold, as in Massachusetts and New York, that the receipt-man had no property whatever in the chattels, for which this action was brought, but only a mere naked custody, still, his *possession and responsibility over* to the officer, who delivered them to him, must furnish sufficient title and just right for him to recover, as we think, against these defendants. Without this, the plaintiff may be charged for not returning the chattels to the officer, and yet be left remediless for the very injury, which may put it out of *his power* to return them. Though it may be true that the officer who served the process might have maintained the action in his own name, still, it does not follow that he *alone* can have the action. Chancellor Kent, in his Commentaries, vol. 2, p. 585, 3d edition, says, 'notwithstanding all the nice criticism to the contrary, every bailee in lawful possession of the subject of the bailment, may justly be considered as having a *special or qualified property* in it, and as he is responsible to the bailor in a greater or less degree for the custody of it, he, as well as the bailor, may have an action against a third person for an injury to the chattel.' See, also, 2 Kent, Comm. 568; Bac. Abr. Bailment, D.; Roberts *v.* Wyatt, 2 Taunt. R. 268; Rooth *v.* Wilson, 1 Barn. & Ald. 59; Addison *v.* Round, 2 Adolph. & Ell. 799, 804; Nicolls *v.* Bastard, 2 Crompt. Mees. & Rosc. R. 659, 660, 661. In the case of Burroughs *v.* Stoddard, 3 Conn. R. 160, it was expressly held that the receptor of goods attached, who had put them into the actual possession of a third person to take the charge of them, might maintain trespass,

even against a person who had attached the goods as the property of the same debtor. Such third person was regarded as the mere servant of the receiptor. This same question has received very full consideration by the Supreme Court of New Hampshire, in the case of Poole *v.* Symonds, 1 N. Hamp. R. 290, where it is held that the receiptor may well have the action. The defendant, another deputy-sheriff, in that case, too, had attached the property for another creditor as belonging to the same debtor, and was not, of course, without some color of right. The court say that the receiptor acquired a special property in the goods, subordinate to and consistent with the special property of the officer; and that it is not at all inconsistent that two persons should severally have a special property in the chattel, at one and the same time.

"We have been led to a more full examination of this question, in consequence of the opposing decisions in Massachusetts and New York, than we should otherwise have thought necessary. We cannot, however, subscribe to the correctness of their doctrine; and we think, upon well established principles, the plaintiff had, at least, in the language of Sir William Blackstone, '*such possessory interest*,' in the chattels in question, as was sufficient to entitle him to maintain this action. The judgment of the county court must, therefore, be reversed, and the case remanded for a new trial."

## CHAPTER IV.

## MANDATE.

§ 701. A MANDATE is a bailment of personal property, in regard to which the bailee agrees to do some act, without recompense.<sup>1</sup> The only difference between a mandate and a deposit is, that the custody of the thing is the principal object of the deposit, and the labor and service are merely incidental; and in a mandate, the labor and service constitute the principal object, and the custody is only incidental.<sup>2</sup> A mandate must be in respect to some legal and definite act *in futuro*; for, if the act be either illegal, or wholly vague, or absurd, no such contract arises. If, however, the illegality arise from the private relation of the bailor to third persons, of which the bailee is ignorant, he will be entitled to an action for indemnity. Thus, if a trustee authorize a person to buy, or sell, or carry away, goods of his *cestui que trust*, in violation of his trust, the contract would be valid, if the mandatary were ignorant of the fraud. A mandate may be made, either by express or implied assent; it may be conditional or absolute, general or special; it may be varied at the pleasure of the parties; and any party capable of contracting may be a party to this contract.<sup>3</sup>

§ 702. The same general rules, which govern in cases of de-

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<sup>1</sup> Story on Bailm. § 137.

<sup>2</sup> Ibid. § 140.

<sup>3</sup> Ibid. § 145, 146.

posit, are equally applicable to cases of mandate. Thus, both contracts must be voluntary and gratuitous, and both parties are bound by the same measure of diligence; that is, are responsible for gross negligence only.<sup>1</sup> The parties may, however, vary the responsibility implied by law, by means of a special contract. As, if a mandatary be known to possess certain skill or knowledge, and he agree to exert it in a particular case, he is responsible for losses arising from his omission to exercise it. So, also, such a special contract may be implied, either from the situation of the mandatary, or from the mere fact of his undertaking to do something requiring a certain amount of skill or knowledge.<sup>2</sup> As if a competent or skilful workman, or artificer in a certain trade, undertake to repair an article gratuitously, he is bound to exercise competent skill.<sup>3</sup> So, also, where a physician undertakes to attend upon a sick person gratuitously, he would be liable for im-

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<sup>1</sup> Coggs *v.* Bernard, 2 Lord Raym. 909; Elsee *v.* Gatward, 5 T. R. 143; Story on Bailm. 174, et seq.; 2 Kent, Comm. Lect. 40, p. 570; Shillibeer *v.* Glyn, 2 Mees. & Welsb. 145; Nelson *v.* Macintosh, 1 Stark. 237; Dartnall *v.* Howard, 4 B. & C. 345; Stanton *v.* Bell, 2 Hawks, N. C. 146; Foster *v.* Essex Bank, 17 Mass. 479; Tracy *v.* Wood, 3 Mason, 132; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275; Percy *v.* Millaudon, 20 Martin, 75; 2 Kent, Comm. Lect. 40, p. 569. See Story on Bailments, § 174, et seq. Sir William Jones distinguishes between a mandate to do work about goods, and a mandate to carry goods from place to place, and holds, in respect to the former, that the mandatary is bound to a degree of diligence and attention adequate to the performance of his undertaking, and, therefore, may be, in some cases, responsible for ordinary or slight neglect. Jones on Bailm. 50, 62, 117, 120. But see a thorough discussion of this point, maintaining the doctrine as stated in the text, in Story on Bailm. § 174, et seq. And see Coggs *v.* Bernard, 2 Lord Raym. 909; Shiells *v.* Blackburne, 1 H. Black. 158; Moore *v.* Mourgue, Cowp. 480; Story on Bailm. § 150; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659; Storer *v.* Gowen, 18 Maine R. 174.

<sup>2</sup> Tracy *v.* Wood, 3 Mason, 132; Foster *v.* Essex Bank, 17 Mass. 479. See ante, *Deposit.* Kent, Comm. Lect. 40, p. 570, § 571; Shiells *v.* Blackburne, 1 H. Black. 158; Percy *v.* Millaudon, 20 Martin, 75; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275; Story on Bailm. § 177, 182, *a*; Rooth *v.* Wilson, 1 B. & Ald. 59.

<sup>3</sup> Shiells *v.* Blackburn, 1 H. Black. R. 158.

proper treatment growing out of gross negligence or ignorance, because his situation and undertaking imply skill.<sup>1</sup> But if a person who is known to be unskilled, do the work at the solicitation of a friend, and do it as well as he can, he is not liable for not doing it skilfully;<sup>2</sup> for in the first case, the circumstances would indicate gross negligence on the part of the bailee, and in the other case, they would indicate the reverse. If, therefore, a person known not to be a surgeon or physician, and to have no peculiar knowledge or skill in the treatment of disease, be called in and afford gratuitous assistance to the best of his ability, he is not liable if he administer improper remedies.<sup>3</sup>

§ 703. So, also, a mandatary has no special property in the mandate, but only a right of custody, unless he have incurred expenses; in which case, he has a lien, and his rights of action are the same as those of a depositary.<sup>4</sup> So, also, if the property increase in his hands; he is bound to restore all its earnings, increments, and gains. As, if a vehicle be delivered to be let for hire, he must account for the hire, as well as the vehicle. So, also, interest upon money must be returned; and the young born of animals, while they are bailed.<sup>5</sup>

§ 704. But although a mandatary is responsible for gross negligence, yet there is a distinction as to his liability in cases of non-feasance, and in cases of misfeasance. If he have entered upon the execution of the mandate, he is responsible for damages and losses resulting from gross negligence

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<sup>1</sup> *Wilson v. Brett*, 11 Mees. & Welsb. R. 113; *Slater v. Baker*, 2 Wils. R. 359.

<sup>2</sup> *Shiells v. Blackburne*, 1 H. Black. R. 158; *Moore v. Mourque*, 2 Cowp. 479; *Whitney v. Lee*, 8 Metcalf, R. 91; *Steamboat New World v. King*, 16 Howard, U. S. R. 475.

<sup>3</sup> *Wilson v. Brett*, 11 Mees. & Welsb. R. 113.

<sup>4</sup> Story on Bailm. § 150; *Nicolls v. Bastard*, 2 Cromp. Mees. & Rosc. 659; *Angell on Carriers*, § 41.

<sup>5</sup> Story on Bailm. § 144, 146, 150, 155, 158, 159, 160, 161, 162.

in the performance of his duty. But he is not responsible for a total omission of the undertaking, because, being a bailee without hire, his contract is without sufficient consideration;<sup>1</sup> he may utterly reject and refuse to perform it; that is, he is bound to perform his duty well, if he perform it at all; but he is not bound to perform it at all.<sup>2</sup> Thus, where a mandatary undertook to carry several hogsheads of brandy from one cellar to another, and he did it so negligently, that one cask was staved in; it was held, that he was answerable for the damage, although he was not a common carrier.<sup>3</sup> So, also, if A. should intrust a letter to B. containing money, to pay a note due on a particular day, and B. should undertake gratuitously to deliver the letter, and take up the note, and should neglect so to do, and thereby the note should be protested, and A. should suffer a special damage,—B. would be liable; for his acceptance of the letter would be deemed a part-execution, and a sufficient consideration to support the action.<sup>4</sup> Yet, if he had only agreed to take the letter, but had not received it, the agreement would be a *nude pact*.<sup>5</sup> So, if a bank should undertake gratuitously to collect a note, upon the note being indorsed in blank, and left in the bank, and should neglect to issue due notice to the indorsers of the dishonor, when duly presented, it would be responsible.<sup>6</sup> So, also, where A. received post-

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<sup>1</sup> See *Balf e v. West*, 22 Eng. Law & Eq. R. 506.

<sup>2</sup> *Mandatum non suscipere cui libet liberum est; susceptum autem consummandum est, aut quam primum renuntiandum, ut per semetipsum aut per alium, eandem rem mandator exequatur.* Inst. Lib. 3, tit. 27, § 11; *Elsee v. Gatward*, 5 T. R. 149; *Beauchamp v. Powley*, 1 M. & Rob. 38; *Nelson v. McIntosh*, 1 Stark. N. P. C. 237.

<sup>3</sup> *Coggs v. Bernard*, 2 Lord Raym. 909. See, also, *Jenkins v. Motten*, 1 Sneed, (Tenn.) R. 248; *Kirtland v. Montgomery*, 1 Swan, R. 457.

<sup>4</sup> See *Robinson v. Threadgill*, 13 Iredell, 41.

<sup>5</sup> *Shillibeer v. Glyn*, 2 Mees. & Welsb. 115; *Balf e v. West*, 22 Eng. Law & Eq. R. 506; *French v. Reed*, 6 Binn. R. 308; *Ferguson v. Porter*, 3 Florida R. 38.

<sup>6</sup> Do not these cases come within the rule of *part-execution*? Would there be any remedy without part-execution? *Shillibeer v. Glyn*, 2 Mees. & Welsb.

notes, payable at a future day and in another State, and agreed gratuitously to account for the same to B. if collected, or to return them, if payment thereof should be refused, he is bound to cause the notes to be duly presented, and to account for the payment, or to return them.<sup>1</sup> But where a promissory note is delivered to a bailee on his gratuitous undertaking "to secure and take care of it," he is not bound to take any active measures to obtain security, but to keep the note carefully and securely, and receive the money due thereon when offered,—and without proof of fraud or gross negligence the bailor cannot recover in case of loss.<sup>2</sup>

§ 705. If the mandatary be guilty of misuse, or fraud, or any act inconsistent with his contract, he will be responsible for all losses resulting therefrom.<sup>3</sup> The burden of proof is, however, on the mandator, to make out negligence or fraud.

§ 706. The contract of mandate may be determined in various ways. 1st. By the death of the mandatary, when the mandate is wholly unexecuted; for if it be executed in part, his personal representatives may, in some cases, be obliged to complete it. So, if there be joint mandataries, and the bailment be of such a nature as to require the united advice or skill of all, the death of one dissolves it; but not otherwise. 2d. By the death of the mandator, when the mandate is wholly unexecuted. If, however, it be partially executed,

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145; *Wheatley v. Low*, Cro. Jac. 668; *Beauchamp v. Powley*, 1 Mood. & Rob. 38; *Coggs v. Bernard*, 2 Lord Raym. 909; *Story on Bailm.* § 170, 171 *a*, 171 *b*, 171 *c*, 171 *d*; *Wilkinson v. Coverdale*, 1 Esp. R. 75; *Parry v. Roberts*, 3 Adolph. & Ell. 118; *Bainbridge v. Firmston*, 1 P. & D. 2.

<sup>1</sup> *Medomak Bank v. Curtis*, 11 Shep. R. 36.

<sup>2</sup> *Whitney v. Lee*, 8 Metcalf, R. 91.

<sup>3</sup> *Story on Bailm.* § 188, 213; *De Tollenere v. Fuller*, 1 So. Car. Const. R. 121; *Ulmer v. Ulmer*, 2 Nott & McCord, 489; *Catlin v. Bell*, 4 Camp. 183; 2 Kent, Comm. Lect. 40, p. 572.

his representatives may be bound to complete it, in order to prevent an injury to the mandator. 3d. By incapacity of the parties; as by marriage, if the party be a female; or by insanity, or idiocy. 4th. By a renunciation of his agreement by the mandatary, before he has entered upon the execution of it; or by the express or implied revocation by the mandator; and such dissolution operates from the time notice is received. 5th. By the bankruptcy of the mandator. Where the mandatary is to execute a mere authority, his own bankruptcy will not ordinarily dissolve it; although it may, if the act be done, involve the expenditure of money.<sup>1</sup>

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<sup>1</sup> Story on Bailm. 202-212; 1 Bell, Comm. § 413, 4th ed.; Pothier, Contrat de Mandat, n. 105; Story on Agency, § 409, 490; 2 Roper, Husband & Wife, 67, 73; Hunt *v.* Rousmaniere's Adm. 2 Mason, 244; 8 Wheat. 174; Salte *v.* Field, 5 T. R. 215; Minett *v.* Forrester, 4 Taunt. 541; Parker *v.* Smith, 16 East, 382; Story on Agency, § 486.



## CHAPTER V.

## GRATUITOUS LOANS.

§ 707. THIS class of bailment, which is called *commodatum* in the Roman law, and is denominated by Sir William Jones a *loan for use*, (*prêt à usage*,) is the gratuitous lending of an article to the borrower for his own use. If the use be paid for, it becomes a different species of bailment, and therefore the lending must be gratuitous. So, also, it must be lent for use, and the use must be the principal object; for, otherwise, it may be either a pawn or a deposit. The identical property lent must, also, be returned, together with its increment and gain. And herein it differs from a *mutuum*, or loan for consumption, where the thing lent is to be returned in kind. The borrower, however, is not responsible for loss or deterioration, from such use as was contemplated by the parties. But for all injury arising from his default, he is responsible.<sup>1</sup>

§ 708. A borrower has no special property in the thing lent; although his possession is sufficient to enable him to maintain

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<sup>1</sup> Story on Bailm. § 268; Dig. Lib. 13, tit. 6, l. 23; 1 Domat, B. 1, tit. 5, § 2, art. 6, 12; Bayliss v. Fisher, 7 Bing. R. 153; Peake, N. P. R. 49; Murray v. Burling, 10 Johns. 172; Gibbs v. Chase, 10 Mass. 125; Wheelock v. Wheelwright, 5 Mass. 104; Bowman v. Teall, 23 Wend. 306; Todd v. Gigley, 7 Watts, 542. See Scranton v. Baxter, 4 Sandf. 5; Phillips v. Coudon, 14 Ill. 84.

an action of trespass or *trover* against a wrongdoer.<sup>1</sup> In a gratuitous loan, the use is strictly personal, unless the circumstances under which it is made indicate a different intention; as, if a man lend another his carriage and horses for a month, it would be ordinarily presumed that he intended to allow the use of them to the family of the borrower, but not to strangers. But if a horse be lent, the presumption would be, that the bailee himself was alone entitled to use it.<sup>2</sup> So, also, the use is to be limited by the terms of the agreement; and if a horse be lent to a person to ride to a particular place, he will not thereby acquire a right to ride to a further or different place.<sup>3</sup>

§ 709. Inasmuch as the bailment is for the exclusive benefit of the borrower, he is bound to exercise great diligence in relation thereto, and is responsible for slight neglect. Yet if the lender be aware of any incapacity, ignorance, or unskilfulness on the part of the borrower, he cannot claim damages for a loss resulting from such a degree of carelessness as would be presumable from such known incapacity. Thus, if a delicate piece of machinery be lent to a person who is known by the lender to be unskilful and unacquainted with its use, he cannot be required to exercise the skill of an experienced workman. The degree of diligence which the borrower is bound to exercise is therefore proportionate to his known skill and

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<sup>1</sup> Nicolls *v.* Bastard, 2 Cromp. Mees. & Rose. 659; Burton *v.* Hughes, 2 Bing. 173; Ogle *v.* Atkinson, 5 Taunt. 759; Hurd *v.* West, 7 Cow. 752; Anmory *v.* Delamirie, 1 Str. 505; 2 Bl. Comm. 453; Story on Bailm. § 93, 94, 150, 152, 280; Kent, Comm. Lect. 40, p. 573; Little *v.* Fossett, 31 Maine, 545.

<sup>2</sup> Bringloe *v.* Morrice, 1 Mod. R. 210; s. c. 3 Salk. R. 271; Scranton *v.* Baxter, 4 Sandf. R. 8.

<sup>3</sup> Wheelock *v.* Wheelright, 5 Mass. 104; Jones on Bailm. 68; Pothier, *Prêt à Usage*, n. 2, 22; Isaack *v.* Clarke, 2 Bulst. 306; Story on Bailm. § 231, 232, 254, 390, 409, 413.

ability, and must depend on the circumstances of each case. Negligence will not be necessarily presumed from the fact that the article bailed is stolen ; but such negligence must be proved.<sup>1</sup>

§ 710. Where the borrower has exercised the greatest diligence, he is not liable for losses from inevitable accident, or from external and irrepressible external violence ; as, for instance, losses by fire, shipwreck, lightning, pirates, robbers, mobs, and the fraud of strangers ; against which he could not guard, and which occur without his default. But if he might have prevented such loss by greater diligence, he will be responsible. Thus, if a man drive a borrowed horse, late at night, over a dark and dangerous road, he will be liable for any injury which the horse may receive ; because he might have prevented such an injury by proper precautions. So, also, if a man stand his borrowed horse under a ruinous shed, and it fall, and maim the horse, he is responsible ; unless the fall were occasioned by tempest, or inevitable accident, which could have overthrown a strong shed. So, also, if the borrower be guilty of fraud, he is responsible for all injuries and losses, whether arising from his negligence or not.<sup>2</sup>

§ 711. The question has been much discussed, whether, in case of fire, a borrower is bound to save the borrowed goods first, and in preference to his own. Pothier and Sir William Jones think that the borrowed article should be first saved ; because the borrower is bound to the strictest diligence in the preservation of it, and nothing will excuse him but *vis major*.<sup>3</sup>

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<sup>1</sup> Story on Bailm. § 237, 238, 239 ; Jones on Bailments, 64, 56, 66 ; Vaughan *v.* Menlove, 3 Bing. N. C. 468, 475 ; Coggs *v.* Bernard, 2 Lord Raym. 909 ; 2 Kent, Comm. Lect. 40, p. 574, 575 ; Pothier, Prêt à Usage, n. 49 ; Niblett *v.* White, 7 Louis. 253.

<sup>2</sup> Pothier, Prêt à Usage, n. 55, 56, 57 ; Jones on Bailm. 67, 68, 69 ; 2 Kent, Comm. Lect. 40, p. 576 ; Story on Bailm. § 242, 243.

<sup>3</sup> Jones on Bailm. 69, 70 ; Pothier, Prêt à Usage, n. 58. In case of deposit, Pothier holds a different rule. Pothier, Traité de Dépot, n. 29.

But the better opinion seems to be, that the ordinary rule of diligence is applicable to this case, as well as to others ; and that a borrower is only bound to show that he was not guilty of negligence ; for he is not bound to make every sacrifice ; and if his own goods were much more valuable, he would be justified in saving them first.<sup>1</sup>

§ 712. The rights of the parties to this contract may be varied by a special agreement, and then they would be extended or restricted by the terms thereof. Thus, if a person, on making a loan, should affix to it a certain value, and say, that he should hold the borrower responsible for such a sum, if the article were injured or destroyed, the borrower would be bound to pay that sum, if the article were lost.<sup>2</sup>

§ 713. The borrower must adhere to the terms and conditions of the loan ; and if he violate them, or exceed what would be fairly inferred to be the intention of the lender, he is responsible for all losses resulting therefrom, whether they be inevitable or not. Thus, if, by his own default, he detain the article after it is demanded, or after he agreed to return it, and it be destroyed by fire, he is liable for it.<sup>3</sup> But the borrower may, under certain circumstances, be not only justified in retaining the bailment, but even may be bound to retain it, beyond the time within which he promised to return it. Thus, if the returning of it be accompanied with great risk and danger thereto, and he, notwithstanding, undertake to return it, he will be liable for any loss or injury that may occur. So, also, he may retain it beyond the agreed time, for the purpose of preventing a crime.<sup>4</sup>

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<sup>1</sup> Story on Bailm. 245 251 ; 2 Kent, Comm. Lect. 40, p. 575.

<sup>2</sup> Story on Bailm. § 252, 253, 253 a.

<sup>3</sup> Story on Bailm. § 254 ; 2 Kent, Comm. Lect. 40, p. 575 b; Pothier, *Prêt à Usage*, n. 59; Booth v. Terrell, 16 Georgia R. 25.

<sup>4</sup> Story on Bailm. § 263 ; Pothier, *Prêt à Usage*, n. 42.

§ 714. The ordinary expenses incurred in the use of the bailment must be paid by the borrower. As, if a horse be lent, the borrower must pay for his feed and shoeing. But the lender must bear all extraordinary expenses which may be incurred ; as, if the horse fall sick, the borrower may reclaim the money necessarily expended in curing him.<sup>1</sup>

§ 715. The lender is bound not to interfere with the borrower or impede his use of the bailment, under the peril of damages. He is also bound to give him notice of any defect in the article lent ; and if he do not, and, in consequence thereof, an injury ensue, he is responsible therefor. So, also, if the borrower lose the bailment, and pay the value of it to the lender, and afterwards, upon finding it, return it to the lender, the lender is bound either to surrender to the borrower the article itself, or its value.<sup>2</sup>

§ 716. Except under special contract, the loan is determined by the death of the lender or borrower ; or by the change of estate, as by marriage.

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<sup>1</sup> Story on Bailm. § 256, 273.

<sup>2</sup> Story on Bailm. § 271, 275, 276 ; Pothier, Prêt à Usage, n. 78, 84.

## CHAPTER VI.

## PAWN, OR PLEDGE.

§ 717. A PAWN, or pledge, is the deposit of an article as security for debt. It is distinguished from a mortgage by two incidents. First, a pledge only confers a special property upon the pledgee; while by a mortgage, the whole legal title passes conditionally to the mortgagee. Secondly, the right of the pledgee depends entirely upon possession; but possession is not necessary to create or support a mortgage.<sup>1</sup> A pledge must be given as a *security* for some debt or engagement, but not necessarily for that of the pledgor; for by agreement between the parties, it may be given for any species of debt, or engagement, due from any person; and what the actual agreement is, may be inferred from circumstances. So, also, unless there be a special agreement to the contrary, it will be considered as a security for the entire debt, and therefore cannot be redeemed by a partial payment thereof.<sup>2</sup>

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<sup>1</sup> Ward *v.* Sumner, 5 Pick. 59, 60; Holmes *v.* Crane, 2 Pick. 607; Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200, 202; Brown *v.* Bement, 8 Johns. 96; Barrow *v.* Paxton, 5 Johns. 258; Peters *v.* Ballestier, 3 Pick. 495; Langdon *v.* Buel, 9 Wend. 80; Ferguson *v.* Lee, 9 Wend. 258; Patchin *v.* Pierce, 12 Wend. 61; Bonsey *v.* Amee, 8 Pick. 236; Eastman *v.* Avery, 10 Shep. R. 248; Brownell *v.* Hawkins, 4 Barb. 491.

<sup>2</sup> Badlam *v.* Tucker, 1 Pick. 398; Holbrook *v.* Baker, 5 Greenl. 309; D'Wolf *v.* Harris, 4 Mason, R. 515; Conard *v.* Atlantic Ins. Co. 1 Peters, 418; U. S. *v.* Hooe, 3 Cranch, 73; Shirras *v.* Caig, 7 Cranch, 34; Stevens *v.* Bell, 6 Mass. 339; Pothier de Nantissement, n. 12; Gilb. Eq. R. 104; Story on Bailm. § 300, 301.

§ 718. Possession and delivery are necessary to consummate a pledge, and nothing, therefore, which is not in existence, and nothing, of which the possession cannot immediately be given, can be pledged.<sup>1</sup> If a pledgor have a limited title to any thing, he may pledge it to the extent of his title.<sup>2</sup> So, also, money, *chooses in action*, stocks,<sup>3</sup> negotiable instruments, and any personal property may be pledged.<sup>4</sup> This rule is restricted, however, to such negotiable securities as pass for money; but it does not apply to negotiable securities for goods, such as bills of lading. So, also, the holder of negotiable securities belonging to another person, and held by him as trustee, cannot pledge them on his own account.<sup>5</sup> So, also, a factor, having a lien on goods for advances, or for a general balance, has no right to pledge them on his own account.<sup>6</sup> It is not neces-

<sup>1</sup> *Macomber v. Parker*, 14 Pick. 497; *Story on Bailm.* § 290, 294; *Cortelyou v. Lansing*, 2 Cain. Cas. in Err. 200, 202.

<sup>2</sup> *Hoare v. Parker*, 2 T. R. 376; 4 Camp. 121; *M'Combie v. Davies*, 7 East, 5; 1 Dane, Abr. ch. 17, art. 4, § 7; 1 Domat, B. 3, tit. 1, § 3, art. 25.

<sup>3</sup> *Wilson v. Little*, 1 Sandf. 351; 2 Comst. 443; *Hasbrouck v. Vandervoort*, 4 Sandf. 74.

<sup>4</sup> *Kemp v. Westbrook*, 1 Ves. sen. 278; *Lockwood v. Ewer*, 9 Mod. 278; s. c. 2 Atk. 303; *McLean v. Walker*, 10 Johns. 471, 475; *Roberts v. Wyatt*, 2 Taunt. 268; *Jarvis v. Rogers*, 13 Mass. 105; 15 Mass. 389; *Bowman v. Wood*, 15 Mass. 534; *Cortelyou v. Lansing*, 2 Cain. Err. 200; 1 Dane, Abr. ch. 17, art. 4, § 11; *Garlick v. James*, 12 Johns. 146; *Story on Bailm.* § 290.

<sup>5</sup> *Abbott on Shipp.* p. 4, ch. 9, § 10; *Story on Bailm.* § 296, 323; *Sunner & Hamlet*, 12 Pick. 76; 2 Kent, Comm. Lect. 41, p. 627, and note *a*; *Story on Agency*, § 113, and note, 225; *Treutell v. Barandon*, 8 Taunt. 100; *Sigourney v. Lloyd*, 8 B. & C. 622; s. c. 5 Bing. 525; *Newsom v. Thornton*, 6 East, 17; *Martini v. Coles*, 1 M. & S. 140; *Shipley v. Kymer*, 1 M. & S. 484; *Pickering v. Busk*, 15 East, 38; *Queiroz v. Trueman*, 3 B. & C. 342.

<sup>6</sup> 2 Kent, Comm. Lect. 40, p. 626-628; *Jarvis v. Rogers*, 15 Mass. 389; *Van Amringe v. Peabody*, 1 Mason, 440; *Urquhart v. McIver*, 4 Johns. 103; *Daubigny v. Duvall*, 5 T. R. 604; *Newsom v. Thornton*, 6 East, 17; *M'Combie v. Davies*, 7 East, 5; *Martini v. Coles*, 1 M. & S. 140; *Queiroz v. Trueman*, 3 B. & C. 342; *Story on Bailm.* § 325; *Shipley v. Kymer*, 1 M. & S. 484; *Pickering v. Busk*, 15 East, 44; *Solly v. Rathbone*, 2 M. & S. 298; *Story on Agency*, 113, and note, § 225, 227; *Kinder v. Shaw*, 2 Mass. 398; *Odiorne v. Maxcy*, 13 Mass. 178.

sary, however, that the pledge should be the property of the pledgor, if it be pledged with the consent of the owner; and even if it be pledged without his consent, the owner can alone take advantage of the fact.<sup>1</sup>

§ 719. In the first place, delivery is absolutely necessary to complete the bailment; for until the pledge is delivered, the contract is only executory. Where, however, actual delivery would be difficult or impossible, a constructive delivery will be sufficient. Thus, goods stored in a warehouse may be pledged by a delivery of the key; or goods at sea by the transfer of a bill of lading.<sup>2</sup> In the next place, a pledgee acquires a temporary right to the pledge, and is entitled to retain exclusive possession thereof against all persons whatsoever.<sup>3</sup> He may even sue the owner therefor, if it be wrongfully taken from him by the owner.<sup>4</sup> So, also, as the pledge depends upon possession, if the pledgor voluntarily surrender the possession thereof, or lose it, he loses his title thereto,<sup>5</sup> unless he surrender it temporarily, and upon an agreement that it shall be returned to him; in which case, he may recover it from any person holding it, even though it be the owner. Thus, if he re-deliver it to the pledgor as his special bailee or agent, he may recover it from him.<sup>6</sup> But it cannot be taken from

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<sup>1</sup> *Jarvis v. Rogers*, 18 Mass. 105.

<sup>2</sup> *Jewett v. Warren*, 12 Mass. 300; *Badlam v. Tucker*, 1 Pick. 398; *Whitaker v. Sumner*, 20 Pick. 405; *Tuxworth v. Moore*, 9 Pick. 347; 2 T. R. 462; *Story on Bailm.* § 297.

<sup>3</sup> 2 Black. Comm. 396; *Jones on Bailm.* 80; *Cortelyou v. Lansing*, 2 Cain. Cas. in Err. 202; *Garlick v. James*, 12 Johns. R. 146; *Mores v. Conham, Owen*, 123; *Ratcliff v. Davis*, 1 Bulst. 29; *Coggs v. Bernard*, 2 Lord Raym. 909; *Bac. Abr. Bailment*, B.; *Whitaker v. Sumner*, 20 Pick. 399; 2 Bell, Comm. § 701; 2 Kent, Comm. Lect. 40, p. 578, 585; *Lyle v. Barker*, 5 Binn. 457; *Harker v. Dement*, 9 Gill, 7.

<sup>4</sup> *Gibson v. Boyd*, 1 Kerr, (N. B.) Rep. 150.

<sup>5</sup> *Eastman v. Avery*, 23 Maine R. 218.

<sup>6</sup> *Homes v. Crane*, 2 Pick. 607; *Jarvis v. Rogers*, 15 Mass. 389; *Sumner v. Hamlet*, 12 Pick. 76; *Bonsey v. Amee*, 8 Pick. 236; *Look v. Comstock*, 15

his possession upon an execution, in an action against the pledgor.<sup>1</sup>

§ 720. The pledgee may hold the pledge, also, as security not only for the original debt, for which it was given, but also for all incidental or additional engagements directly connected therewith, and emanating therefrom; as interest, and necessary expenses. Indeed the pledgee is not bound to surrender the pledge, until he has been reimbursed for all his necessary expenditures in the custody thereof, although by accident no benefit accrue therefrom to the pledgor.<sup>2</sup> But unless there be an express or implied agreement to the contrary, the pledge can be only held by him as security for the original debt, and its incidents and accessories; and does not extend to other debts wholly unconnected therewith.<sup>3</sup>

§ 721. But inasmuch as the pledge is only collateral *security* for the debt, the possession of it by the pledgee does not limit his rights upon the original claim.<sup>4</sup> Where, therefore, a

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Wend. 244; Reeves *v.* Capper, 5 Bing. N. C. 136; Ryall *v.* Rolle, 1 Atk. 165; Roberts *v.* Wyatt, 2 Taunt. 268; Story on Bailm. § 299; Macomber *v.* Parker, 14 Pick. 497; Hays *v.* Riddle, 1 Sandf. 248; Spaulding *v.* Adams, 32 Maine, 211.

<sup>1</sup> Coggs *v.* Bernard, 2 Lord Raym. 909; Badlam *v.* Tucker, 1 Pick. 389; Marsh *v.* Lawrence, 4 Cow. 461; 1 Dane, Abr. ch. 17, art. 4, § 3. By special statute in Massachusetts, pledges may be attached upon tender of the amount due on the pledge, or the pledgee may be summoned as a trustee to answer for the surplus. Revised Stat. 1836, ch. 90, § 78, 79, 80; Pomeroy *v.* Smith, 17 Pick. 85. See, also, Wheeler *v.* McFarland, 10 Wend. 318.

<sup>2</sup> Story on Bailm. § 357.

<sup>3</sup> Demandray *v.* Metcalf, Prec. Ch. 419; 2 Vern. 691; 2 Story on Eq. Jurisp. § 1034; Jarvis *v.* Rogers, 15 Mass. 389, 397; Green *v.* Farmer, 4 Burr. 2214; Gilliat *v.* Lynch, 2 Leigh, 493; Ex parte Ockenden, 1 Atk. 236; Jones *v.* Smith, 2 Ves. jr. 372; Vanderzee *v.* Willes, 3 Bro. Ch. R. 21; Walker *v.* Birch, 6 T. R. 258; 7 East, 224; 15 Mass. 490; Story on Bailm. § 304, 306; St. John *v.* O'Connel, 7 Porter, (Alab.) 466; 3 Metcalf, R. 360.

<sup>4</sup> Whitwell *v.* Brigham, 19 Pick. R. 117.

negotiable security is taken as collateral to an existing debt, the holder may endeavor to make it available in a suit, but failing of success, he may resort to his original security without restoring that taken as collateral.<sup>1</sup> Yet in such case he is bound to observe due diligence in the collection of the note, and in giving notice of non-payment, &c., and if the security be lost by his negligence, he is liable.<sup>2</sup> He may, therefore, at any time, sue upon the debt, for which it is pledged, without surrendering it. So, also, if the pawn be lost, or tortiously converted by the pawnee to his own use, and the pawnor recover the value thereof from the pawnee, the original debt still survives, and may be sued.<sup>3</sup>

§ 722. Upon default of the pawnor to fulfil his engagements, or pay his debt, the pawnor cannot appropriate the specific pawn,<sup>4</sup> unless it be conveyed by way of mortgage, so as to pass the legal title.<sup>5</sup> But he may sell it, and apply the proceeds of such sale to the liquidation of his claim. He cannot, however, become the purchaser himself.<sup>6</sup> Where, therefore, bank shares, which had been pledged to the bank in security of a loan, were sold at auction, upon the death of the pledgor, and the bank itself became the purchaser, gave credit for the sale, and claimed the balance from the borrower's administrator, it was held that no property in the shares passed to the bank by the sale, but that they still held them under their

<sup>1</sup> Comstock *v.* Smith, 10 Shepley, R. 202.

<sup>2</sup> Foote *v.* Brown, 2 McLean, R. 369. In the matter of Dyotts, 2 Watts & Serg. 463.

<sup>3</sup> South Sea Co. *v.* Duncomb, 2 Str. 919; Anon. 12 Mod. 564; Elder *v.* Rouse, 15 Wend. 218; Langdon *v.* Bucl, 9 Wend. 80, 83; Case *v.* Boughton, 11 Wend. 106; Cleverly *v.* Brackett, 8 Mass. 150; Glanville, Lib. 10, ch. 6; 1 Reeves's Hist. of Law, 161, 163; Yelv. 178; 1 Bulst. 29; 2 Caines, Cas. in Error, 200.

<sup>4</sup> Garlick *v.* James, 12 Johns. R. 146.

<sup>5</sup> Jones *v.* Smith, 2 Ves. jr. 378; 2 Caines, Cas. in Err. 200; Story on Bailm. § 308 to 311, 345; Brownell *v.* Hawkins, 4 Barb. 491.

<sup>6</sup> Story, Eq. Jurisp. § 308-323.

original title, as collateral security for their claim,<sup>1</sup> although, had the sale been to a third person, it would have been perfectly valid. Until the pledge be sold, however, the pawnor may redeem it at any time after his default; for so long as it remains in the hands of the pledgor, it can only be considered as security for the original debt, and never as the property of the pledgee; and if he die, it may be redeemed from his representatives. Nor will prescription, nor the statute of limitations, run against it.<sup>2</sup>

§ 722 a. A pledgee has, however, no right to dispose of a pledge by sale, before the debt for which it is given as security is due, unless there be an express or implied stipulation in the contract, allowing him such a right. Where, therefore, shares of bank stock are deposited to secure the payment of a note due at a certain date, the pledgee ordinarily has no authority to dispose of those shares.<sup>3</sup> Yet, if a general usage be proved and be known to the parties, allowing the pledgee to transfer the collateral stock by hypothecation, and not binding him to hold the specific shares, it would seem, that he would have a right so to use the stock pledged, provided he kept himself ready on the payment of the original debt to retransfer to the pledgor an equal number of shares of the same stock.<sup>4</sup> But this modification would only apply in cases where the subject pledged was in the nature of money or shares of stock, where the holding of the specific pledge is not essential. But if there be an express or implied stipulation, that the specific stock shall be retained, as if the pledgee be authorized to "sell the same on non-performance of this promise," which is an implied

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<sup>1</sup> Middlesex Bank *v.* Minot, Admr. 4 Metcalf, R. 329. See, also, Hatch *v.* Hatch, 9 Ves. R. 292; Farnam *v.* Brooks, 9 Pick. R. 212.

<sup>2</sup> Kemp *v.* Westbrook, 1 Ves. R. 278.

<sup>3</sup> Allen *v.* Dykers, 3 Hill, N. Y. R. 597; 7 Hill, 498. But see Hasbrouck *v.* Vandervoort, 4 Sandf. 74; Wilson *v.* Little, 1 Sandf. 351; 2 Comst. 443.

<sup>4</sup> Ibid. Nourse *v.* Prime, 4 Johns. Ch. R. 490; s. c. 7 Johns. Ch. R. 69.

stipulation, that he shall not sell before non-performance, he must retain the specific stock.<sup>1</sup>

§ 723. If, however, the time at which the debt is to be paid, or the engagement to be fulfilled, be indefinite, the pledgee may, after the lapse of a reasonable time, either demand payment, and, upon neglect or refusal thereof by the pledgor, he may, after giving proper notice,<sup>2</sup> proceed to sell the pledge. Or, he may file a bill in equity against the pledgor, for a foreclosure and sale.<sup>3</sup> So, also, if several things be pledged, each may be sold *seriatim*, until the whole debt is discharged. But he cannot sell, after the proceeds of the sale are sufficient to satisfy his claims; and if, in any case, there be a surplus, it enures to the benefit of the pledgor. So, also, if the proceeds of the sale be insufficient to satisfy his demand, the surplus is still due from the pledgor, and may be recovered from him.<sup>4</sup>

§ 724. If the use of a pawn be either necessary to its preservation, or beneficial, the pawnee may use it. Thus, if a pointer be pledged, it may be used for sporting, so as to be

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<sup>1</sup> Allen *v.* Dykers, 3 Hill, R. 595.

<sup>2</sup> And a stipulation that if the pledge be not redeemed in a certain time, the right of the pledgee shall become absolute, has been held of none effect. Luckett *v.* Townsend, 3 Texas, 119.

<sup>3</sup> Story on Bailm. § 308; 2 Kent, Comm. Lect. 40, p. 581, 582; Story on Eq. Jurisp. § 1031-1035; Pothier, Pand. Lib. 20, tit. 5, n. 1, 2, 3, 18, 19; Kemp *v.* Westbrook, 1 Ves. 278; Cortelyou *v.* Lansing, 2 Caines, Cas. in Err. 200; Garlick *v.* James, 12 Johns. 146; Patchin *v.* Pierce, 12 Wend. 61; Hart *v.* Ten Eyck, 2 Johns. Ch. R. 62, 513. The common law of England, in the time of Glanville, required process, before sale; but the rule is different now. Glanville, Lib. 10, ch. 1, 6; 1 Reeves, Hist. of Law, 161, 162; 2 Bell, Comm. § 701, 4th ed.; Ibid. p. 20, 21, 22.

<sup>4</sup> South Sea Co. *v.* Duncomb, 2 Str. 919; 1 Domat, B. 3, tit. 1, § 1, art. 31; Stevens *v.* Bell, 6 Mass. 339; Bacon, Abr. Bailment, B.; Ratcliff *v.* Davies, Yelv. 178; Pothier de Nantissement, n. 43.

kept in good training. So, also, if the keeping of the pledge be an expense to the pledgee, he may indemnify himself therefor, by a reasonable use thereof; as, if a horse be pledged, he is privileged to ride or drive him moderately. But if the use be absolutely injurious, he must not use it. So, also, if the use be dangerous, he must take the risk, if he use it. Thus, if jewels be pawned, and worn in a public place, and be stolen there, the pawnee must bear the loss.<sup>1</sup>

§ 725. The measure of diligence which a pawnee is bound to observe, in keeping a pawn, is ordinary diligence; and he is only liable for ordinary neglect; because the bailment is for the mutual benefit of the parties. What constitutes ordinary diligence is a matter of evidence, and depends upon the circumstances of each particular case. The mere fact of theft, however, creates even no presumption of negligence.<sup>2</sup> Demand and refusal will, however, be evidence of a conversion, which must be rebutted by positive proof.<sup>3</sup> If an action be brought against a pawnee, for negligence, the *onus probandi* is upon the party bringing the action.<sup>4</sup>

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<sup>1</sup> Story on Bailm. § 329, 330, 331; Jones on Bailm. § 81; Coggs *v.* Bernard, 2 Lord Raym. 909; Mores *v.* Conham, Owen, 123; 2 Salk. 522; Thompson *v.* Patrick, 4 Watts, 414; 2 Kent, Comm. Lect. 40, p. 578; Bagshawe *v.* Goward, Cro. Jac. 147; s. c. Noy, 119; Duncomb *v.* Reeve, Cro. Eliz. 783; Roll. Abr. 673, 632; 9 Viner, Abr. Distress, P. Pt. 8; Buller, N. P. 72.

<sup>2</sup> Coggs *v.* Bernard, 2 Ld. Raym. 909, 716; Bracton, 99, b; Jones on Bailm. 15, 21, 23, 75; Story on Bailm. § 38, 39, 332, 338, 380; 2 Kent, Comm. Lect. 40, p. 560, 581; Finucane *v.* Small, 1 Esp. 315; Clarke *v.* Earnshaw, 1 Gow, 30. For a full discussion of the liability of the pawnee, in cases of theft, see Story on Bailm. § 332, et seq.

<sup>3</sup> Isaack *v.* Clarke, 2 Bulst. 306; Beardslee *v.* Richardson, 11 Wend. 25; Doorman *v.* Jenkins, 2 Ad. & El. 256; Tompkins *v.* Saltmarsh, 14 Serg. & R. 275; Story on Bailm. § 339.

<sup>4</sup> Cooper *v.* Barton, 3 Camp. 5; Harris *v.* Packwood, 3 Taunt. 264; Marsh *v.* Horne, 5 B. & C. 322; Story on Bailm. § 339. But see Platt *v.* Hibbard, 7 Cow. 497.

§ 726. A pawnee is liable for all injuries and losses resulting from his negligence or misconduct; and if he refuse to re-deliver a pawn, upon tender of payment of the full debt, he renders himself responsible for all future losses; unless, perhaps, where the loss must inevitably have happened, without his default.<sup>1</sup> So, also, a pawnee is bound to render a true account of all the income, profits, and advantages received by him from the pawn.<sup>2</sup>

§ 727. This contract of bailment may be extinguished, 1st, by full payment of the debt, and the incidental engagement; or by any other mode of satisfaction; as by receiving other goods in payment or discharge; 2d, by taking a higher or a different security, (as a bond, or obligation, or a promissory note,) without any agreement that the pledge shall be also retained; 3d, by the extinguishment of the debt, by operation of law; as where the pledgor obtains judgment against the pledgee, on a suit for the debt; or where the debt is barred by prescription; 4th, by the destruction of the pledge; 5th, by any act, which amounts to a release or waiver of the pledge.<sup>3</sup>

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<sup>1</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909, 916, 917; *Anon.* 2 Salk. 522; *Jones on Bailm.* 70, 71, 79, 80; *Bac. Abr. Bailment*, B.; *Id. Trover, C.*; *Batcliff v. Davis*, Yelv. 178; *Davis v. Garrett*, 6 Bing. 716; *Bell v. Reed*, 4 Binn. 127; 3 Kent, Comm. Lect. 47, p. 206; *Story on Bailm.* § 341, 413 *a*, 413 *b*; *Com. Bank v. Martin*, 1 Louis. Ann. R. 314. See, also, on the liability of a pledgee, the cases of *Goodall v. Richardson*, 14 N. H. R. 567; and *Noland v. Clarke*, 10 B. Monr. 239.

<sup>2</sup> *Houton v. Holliday*, 1 N. Car. Law Repos. 87; *Story on Bailm.* § 343.

<sup>3</sup> *Story on Bailm.* § 359-365; 1 *Domat*, B. 3, tit. 1, § 7, art. 4; *Pothier, Pand. Lib.* tit. 6, § 4, l. 17, 18; *Dig. Lib.* 20, tit. 6, l. 6; *Ayliffe, Pand. B.* 4, tit. 18, p. 536, 537; *Kemp v. Westbroke*, 1 Ves. 278; *Gage v. Bulkely, Ridge. Cas. Temp. Hard.* 283; *Yelv.* 178, 179; 1 *Powell on Mort. by Coventry and Rand*, 401, and note; *Higgins v. Scott*, 2 B. & Ad. 413; *Macomber v. Parker*, 14 Pick. 497; *Homes v. Crane*, 2 Pick. 607; *Runyan v. Mersereau*, 11 Johns. 534; *Reeves v. Capper*, 5 Bing. N. C. 136; *Ryall v. Rolle*, 1 Atk. 165.

## CHAPTER VII.

## CONTRACTS OF HIRE.

§ 728. THIS contract, which in the Roman law is called *Locatio* or *Locatio Conductio*, is a contract by which compensation is given for the temporary use of a thing, or for the labor of a person.<sup>1</sup> Contracts of hiring and letting are of two kinds:—1. *Locatio rei*, or the letting and hiring of a thing; 2. *Locatio operis*, or the hire of labor and services. This last class is subdivided into *Locatio operis faciendi*, or the hire of work and labor to be done, or care and attention to be bestowed on goods bailed; and *Locatio operis mercium vehendarum*, or the hire of the carriage of goods.

§ 729. No bailment for hire can be made for a purpose prohibited by law, or in violation of public policy. Thus, the bailor cannot recover on a bailment of furniture for a brothel; or for a bailment of goods to an enemy, or for the purpose of smuggling.<sup>2</sup>

## 1. LOCATIO REI—HIRE OF THINGS.

§ 730. In cases of *locatio rei*, the letter is bound to make a delivery of the bailment, according to custom and usage,

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<sup>1</sup> Story on Bailm. § 368. See various definitions there collected. 1 Bell, Comm. § 198, 255, 385, 451, 5th ed.; Wood, Inst. B. 3, ch. 5, p. 235.

<sup>2</sup> Pothier, Contrat de Louage, n. 48–52; Story on Bailm. § 379.

and to refrain from any interference or obstruction in regard to it, while the hirer is using it; or, otherwise, he violates his implied obligation. But in case of *misuser*, the bailor may determine the contract by peaceably retaking the bailment, although, if he cannot retake it peaceably, he must bring an action of *trover*, for he cannot use force.<sup>1</sup> So, also, if the property be destroyed or be sold by the bailee before the time during which the thing is bailed has expired, the bailor may bring trover to recover the value of the bailment.<sup>2</sup> But trespass *vi et armis de bonis asportatis* will not lie, unless the property has been intentionally destroyed by the bailee.<sup>3</sup> But where hired property is wrongfully converted by the bailee, and so annexed by the bailor to real estate as to form a part thereof, which cannot be separated without great injury to the property, and sold by him to a third person without notice of the facts, the bailor cannot reclaim his property from the purchaser, but his only remedy is by action against the original wrongdoer, the bailee.<sup>4</sup> Thus, where an engine and boilers were hired, and affixed so firmly to the earth and building of the bailor, as to render it impossible to remove them without destroying or greatly injuring the building in which they were placed, and the whole estate was purchased by a *bonâ fide* buyer without notice of the facts, it was held that the remedy of the bailor was against the original bailee, and not against the purchaser.<sup>5</sup>

§ 730 a. So, also, the bailor impliedly warrants his own title

<sup>1</sup> Wilkinson *v.* King, 2 Camp. 335; Loeschman *v.* Machin, 2 Stark. 311; Youl *v.* Harbottle, Peake, R. 49; Rotch *v.* Hawes, 12 Pick. 136; Homer *v.* Thwing, 3 Pick. 492; Story on Bailm. § 396; 2 Salk. 655; Fouldes *v.* Willoughby, 8 Mees. & Wels. 540; Sitzar *v.* Butler, 5 Iredell, R. 212.

<sup>2</sup> Morse *v.* Crawford, 17 Verm. R. 499; Sargent *v.* Gile, 8 N. Hamp. R. 325; Cooper *v.* Willomat, 1 Com. B. Rep. 672.

<sup>3</sup> Setzar *v.* Butler, 5 Iredell, R. 212.

<sup>4</sup> Fryatt *v.* The Sullivan Co. 7 Hill, R. 529.

<sup>5</sup> Fryatt *v.* The Sullivan Co. 5 Hill, R. 117; affirmed 7 Hill, R. 529.

and right of possession; and is bound to keep the thing in suitable order and repair, for the purposes of the bailment; although the extent of the obligation of the letter to repair is not distinctly defined by judicial decisions, and is still open to controversy.<sup>1</sup> So, also, he is bound to pay for all extraordinary expenses necessarily incurred, without his fault.<sup>2</sup> The ordinary expenses, however, are at the expense of the hirer.<sup>3</sup> The letter is also understood to warrant against all such faults and defects as would entirely prevent the contemplated use and enjoyment of the bailment, or render it dangerous, but not against those which diminish its convenience and appropriateness for the use intended.<sup>4</sup>

§ 731. The hirer has a qualified right of property in the thing hired, and may maintain an action for a tortious dis-possession of it, or for injury to it, during the time for which it was hired, even against the general owner.<sup>5</sup> So, also, the owner has a general property, and may equally maintain a suit against a stranger, for a similar cause. The recovery, however, by either the owner or hirer, is, ordinarily, a bar to an action by the other.<sup>6</sup> The hirer is bound to observe ordi-

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<sup>1</sup> Pomfret *v.* Ricroft, 1 Saund. R. 321, 323, and note 7; Cheetham *v.* Hampson, 4 T. R. 318; Roberts *v.* Wyatt, 2 Taunt. R. 268; Story on Bailm. § 392; Holt, N. P. R. 207; 2 Kent, Comm. Lect. 40, p. 586.

<sup>2</sup> Pothier de Contrat de Louage, No. 77, 106, 107, 109, 131; Story on Bailment, § 384, 386, 387, 388, 389; 2 Kent, Comm. Lect. 40, p. 586; 1 Bell, Comm. 453, (5th ed.); Ersk. Inst. B. 3, tit. 1, § 23; Code of Louis. art. 2663, 2664, 2665. See Redding *v.* Hall, 1 Bibb, R. 536.

<sup>3</sup> Hanford *v.* Palmer, 2 Bro. & Bing. 359; s. c. 5 Moore, 74; Story on Bailm. § 388, 393, 399.

<sup>4</sup> Pothier, Contrat de Louage, No. 110; Code Civil de France, art. 1721; Code of Louisiana, art. 2665; Story on Bailm. § 390.

<sup>5</sup> Hickok *v.* Buck, 22 Verm. R. 149.

<sup>6</sup> Croft *v.* Alison, 4 B. & Ald. 590; 2 Saund. 47 b; Id. 47 e; Bacon, Abr. Trespass, C.; Id. Trover, C.; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659, 660; 2 Black. Comm. 396; Gordon *v.* Harper, 7 T. R. 9; Pain *v.* Whittaker, 1 Ry. & Mood. 99; 9 Mass. R. 104; Story on Bailm. § 394; Hall *v.* Pickard, 3 Camp. 187.

nary care and diligence, and is of course responsible only for ordinary negligence; the contract being for the mutual benefit of both parties.<sup>1</sup> So, also, the hirer is not only liable for injuries and losses occasioned by his own default, but also for those occasioned by the default of all persons in his service, and acting under his directions,<sup>2</sup> provided they be neither wilful nor malicious; for in such case he would not be responsible. Thus, if a valuable musical instrument be hired, and the servant of the bailee accidentally let it fall, or throw it down, so as to injure it, the bailee will be liable; but if the servant maliciously break it with a hammer, the servant will be solely liable.<sup>3</sup> So, the master is liable for the acts of his servants done in the course of their employment, even though they are in disobedience to the master's orders.<sup>4</sup> But the

<sup>1</sup> 1 Dane, Abr. ch. 17, art. 12; Story on Bailm. § 398; 2 Kent, Comm. Lect. 40, p. 586, 587, and note *d*, Ibid.; Dean *v.* Keate, 3 Camp. 4; Millon *v.* Salisbury, 13 Johns. 211; 2 Brod. & Bing. 359; Platt *v.* Hibbard, 7 Cow. 497; Reeves *v.* Ship Constitution, Gilp. 579, 585; Cooper *v.* Barton, 3 Camp. 5, note; Salter *v.* Hurst, 5 Miller, Louis. R. 7; Whalley *v.* Wray, 3 Esp. 74; 1 Bell, Comm. p. 453, 454, 5th ed.; Davey *v.* Chamberlain, 4 Esp. 229; Pothier, *Contrat de Louage*, n. 190, 192, 197, 200; Garside *v.* T. & M. Navigation Co. 4 T. R. 581; Handford *v.* Palmer, 5 Moore, R. 76; s. c. 2 B. & B. 359; Columbus *v.* Howard, 6 Georgia R. 213; Hawkins *v.* Phythian, 8 B. Monroe, R. 515; Harrington *v.* Snyder, 3 Barb. R. 380; Swigert *v.* Graham, 7 B. Monroe, R. 661; Heathcock *v.* Pennington, 11 Iredell, R. 640.

<sup>2</sup> Sinclair *v.* Pearson, 7 N. Hamp. R. 219.

<sup>3</sup> Bray *v.* Mayne, 1 Gow, R. 1; Dean *v.* Keate, 3 Camp. 4; Story on Bailm. § 400; Sinclair *v.* Pearson, 7 N. Hamp. R. 219; 1 Bell, Comm. p. 455; 1 Black. Comm. 430, 431; Salem Bank *v.* Gloucester Bank, 17 Mass. R. 1; Jones on Bailm. 89; Randelson *v.* Murray, 3 Nev. & Per. 239; s. c. 8 Ad. & Ell. 109; Bush *v.* Steinman, 1 B. & P. 409; Laugher *v.* Pointer, 5 B. & C. 547; Boson *v.* Sandford, 2 Salk. 410; Milligan *v.* Wedge, 12 Ad. & Ell. 737; Quarman *v.* Burnett, 6 Mees. & Welsb. 499; Knight *v.* Fox, 1 Eng. Law & Eq. R. 477.

<sup>4</sup> Philadelphia & Reading Railroad Co. *v.* Derby, 14 Howard, U. S. R. 468. In this case Mr. Justice Grier said: "The second instruction involves the question of the liability of the master where the servant is in the course of his employment, but, in the matter complained of, has acted contrary to the express command of his master. The rule of '*respondeat superior*,' or that the master shall be civilly liable for the tortious acts of his servant, is of universal

bailee is responsible only for the acts of his own servant, acting under his directions, and not for the acts of the servant of

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application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment. See Story on Agency, § 452; Smith on Master and Servant, 152.

"There may be found, in some of the numerous cases reported on this subject, dicta which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the act of his servant was in disobedience of his orders. But a more careful examination will show, that they depended on the question, whether the servant, at the time he did the act complained of, was acting in the course of his employment, or, in other words, whether he was or was not, at the time, in the relation of servant to the defendant.

"The case of Sleath *v.* Wilson, (9 Car. & Payne, 607,) states the law in such cases distinctly and correctly. In that case a servant, having his master's carriage and horses in his possession and control, was directed to take them to a certain place; but instead of doing so he went in another direction to deliver a parcel of his own, and, returning, drove against an old woman and injured her. Here the master was held liable for the act of the servant, though at the time he committed the offence, he was acting in disregard of his master's orders; because the master had intrusted the carriage to his control and care, and in driving it he was acting in the course of his employment. Mr. Justice Erskine remarks, in this case: 'It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable, and on this ground, that the master has not intrusted the servant with the carriage; but whenever the master has intrusted the servant with the control of the carriage, it is no answer, that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law; the master, in such a case, will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage, by intrusting him with it.'

"Although, among the numerous cases on this subject, some may be found (such as the case of Lamb *v.* Palk, 9 Car. & Payne, 629) in which the courts have made some distinctions which are rather subtle and astute, as to when the servant may be said to be acting in the employ of his master; yet we find

the letter. Yet if he undertake to direct the course which the servant of the letter shall pursue, and loss thereby occur, he will be responsible.<sup>1</sup> Thus, if a person hire a hackney-coach and driver, and the horses or coach be injured, he will not be responsible therefor.<sup>2</sup> But if he hire a coach and horses, and allow his own servant to drive, he will be responsible for injury done by the servant, unless it be wanton and malicious. Yet if he hire a coach, horses, and driver, and insist that the latter shall drive in a particular manner, by which injury is done; or if he order him to leave the horses, and during his absence they run away, and overturn and destroy the coach, the hirer will be liable.<sup>3</sup>

§ 731 a. When both parties are silent as to the number of

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no case which asserts the doctrine, that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim of *respondeat superior*, would, in a measure, nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive, to one who will not submit to control, and render implicit obedience to orders, is itself an act of negligence, the '*causa causans*' of the mischief; while the proximate cause, or the *ipsa negligentia* which produces it, may truly be said in most cases, to be the disobedience of orders by the servant so intrusted. If such disobedience could be set up by a railroad company as a defence, when charged with negligence, the remedy of the injured party would, in most cases, be illusive, discipline would be relaxed, and the danger to the life and limb of the traveller greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases, would be highly detrimental to the public safety."

<sup>1</sup> Sammell *v.* Wright, 5 Esp. 263; Dean *v.* Branthwaite, 5 Esp. 35; Pothier, Contrat de Louage, No. 196; 10 Am. Jur. 256, 257, 258; Milligan *v.* Wedge, 12 Ad. & Ell. 787; Story on Agency, § 53, and note (5); Hughes *v.* Boyer, 9 Watts, 556; Quarman *v.* Burnett, 6 Mees. & Welsb. 499.

<sup>2</sup> Hughes *v.* Boyer, 9 Watts, R. 556.

<sup>3</sup> Laugher *v.* Pointer, 5 B. & C. 547; Quarman *v.* Burnett, 6 Mees. & Welsb. 499.

persons who are to be permitted to drive in a hired carriage, the hirer is authorized to carry such a number as the vehicle was intended to carry, not exceeding the load properly adapted to the horses drawing the same.<sup>1</sup>

§ 732. What constitutes negligence, must depend upon the circumstances of each case, the nature and value of the bailment, and the known skill and capacity of the hirer. He is not liable for thefts, unless they be committed under circumstances which presuppose a want of proper care and diligence.<sup>2</sup> If the injury or loss be occasioned by unavoidable accident, or overwhelming force, and without his fault, he is not liable.<sup>3</sup> By the English rule, the burden of proof is upon the bailor to establish negligence; a mere proof of loss does not create a presumption thereof, which must be rebutted by the bailee.<sup>4</sup> The rule has, indeed, been somewhat controverted in America, and still seems open to doubt.<sup>5</sup>

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<sup>1</sup> *Harrington v. Snyder*, 3 Barb. Sup. Ct. R. 380.

<sup>2</sup> *Finucane v. Small*, 1 Esp. 315; *Brind v. Dale*, 8 Car. & Payne, 207; s. c. 2 Mood. & Rob. 80; *Clarke v. Earnshaw*, 1 Gow, 30; *Broadwater v. Blot, Holt, N. P. R.* 547; *Leck v. Maestaer*, 1 Camp. 138; *Story on Bailm.* § 407; *Jones on Bailm.* 91, 92; *Harrington v. Snyder*, 3 Barb. Sup. Ct. R. 380.

<sup>3</sup> *Menetone v. Athawes*, 3 Burr. 1592; *Longman v. Gallini*; *Abbott on Ship.* 259, note d; *Reeves v. Ship Constitution*, Gilp. 591; *Cailiff v. Danvers, Peake*, 114; *Cowp.* 479; *Butt v. Great Western Railway Co.* 7 Eng. Law & Eq. R. 448.

<sup>4</sup> 1 Bell, Comm. 454; 2 Kent, Comm. Lect. 40, p. 587; *Story on Bailm.* § 410; *Adams v. Inhab. of Carlisle*, 21 Pick. 146; *Carsley v. White*, 21 Pick. 254; *Brind v. Dale*, 8 Car. & Payne, 207; s. c. 2 Mood. & Rob. 80; *Finucane v. Small*, 1 Esp. 315; *Cooper v. Barton*, 3 Camp. 5, note; *Newton v. Pope*, 1 Cow. R. 109.

<sup>5</sup> In *Platt v. Hibbard*, 7 Cowen, R. 501, the contrary doctrine was held, but it was overruled by *Foote v. Storrs*, 2 Barb. S. C. R. 329. See, also, *Schmidt v. Blood*, 9 Wend. R. 268; *Harrington v. Snyder*, 3 Barb. Sup. Ct. R. 380; Post, § 743, and cases cited. But see *Logan v. Mathews*, 6 Barr, (Penn.) R. 417, in which it was held that where the bailee returned a horse in an injured } state,

§ 733. The hirer must not only use the bailment with due diligence, but he must restrict himself to the precise use for which it is hired.<sup>1</sup> Thus, if a horse be hired to journey to one place, the hirer cannot journey with him to another place; and such a *misuser* is considered as a conversion of the property, for which the bailee is responsible to the full extent of the loss, from whatever cause it may happen.<sup>2</sup> There may, however, be an exception in favor of cases where the same injury or loss must inevitably have occurred without such conversion.<sup>3</sup>

• § 734. The hirer is also bound to restore the bailment in as good condition as that in which he received it, subject to the necessary wear or injury occasioned by its proper use; or by internal decay; or by accident, without his default.<sup>4</sup> If he deliver it to another person, negligently or wrongfully, such a delivery is a conversion. But if, on account of injury, he pay the full value of the bailment to the owner, it becomes his own property. So, although the owner receive back the bail-

condition,) without explaining how the injury occurred, (the burden of proof was on him to show that it was not occasioned by his negligence,) See, also, *Rugnan v. Caldwell*, 7 Humph. R. 134; *Bush v. Miller*, 13 Barb. R. 481.

<sup>1</sup> See *Columbus v. Howard*, 6 Georgia R. 213; *Mullen v. Ensley*, 8 Humph. R. 428; *M'Lauchlin v. Lomas*, 3 Strob. R. 85.

<sup>2</sup> Pothier, *Contrat de Louage*, No. 159 to 195; *Story on Bailm.* § 413; Lewin v. *East India Co.* Peake, R. 242; *Jones on Bailm.* § 68, 88; *Lockwood v. Bull*, 1 Cow. 322; *Rotch v. Hawes*, 12 Pick. 136; *Homer v. Thwing*, 3 Pick. 492; *Wheelock v. Wheelwright*, 5 Mass. 101; *Bacon, Abr. Bailm.* 6, *Trover* 6, D. E.; *Isaack v. Clarke*, 3 Bulst. 306; 2 *Saund. R.* 47 b; *Wilkinson v. King*, 2 Camp. 335; *Loeschman v. Machim*, 2 Stark. 311; *Youl v. Harbottle, Peake*, 49; *Sargent v. Gile*, 8 N. Hamp. R. 325. See, also, *Woodman v. Hubbard*, 5 *Foster*, (N. H.) 67; *Gregg v. Wyman*, 4 *Cush. R.* 322.

<sup>3</sup> *Story on Bailm.* § 413 a, 413 b, 413 c; *Davis v. Garrett*, 6 Bing. R. 716; 3 *Kent, Comm. Lect.* 47, p. 210; *Bell v. Reed*, 4 Binn. 127; *Story on Agency*, § 218, 219.

<sup>4</sup> *Handford v. Palmer*, 5 *Moore, R.* 76. See *Esmay v. Fanning*, 9 *Barb.* 176.

ment, the hirer is, nevertheless, liable for all damages from his neglect.<sup>1</sup>

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<sup>1</sup> Syeds *v.* Hay, 4 T. R. 260; Pothier, *Contrat de Louage*, No. 197; Stephenson *v.* Hart, 4 Bing. 476; Stephens *v.* Elwall, 4 M. & Selw. 259; Youl *v.* Harbottle, Peake, 68; Devereux *v.* Barclay, 2 B. & Ald. 702; Cooper *v.* Barton, 3 Camp. 5, n.; Millon *v.* Salisbury, 13 Johns. 211; Reynolds *v.* Shuler, 5 Cow. 323; Story on Bailm. § 404.

## CHAPTER VIII.

## LOCATIO OPERIS — HIRE OF LABOR AND SERVICES.

§ 735. THE class of bailments denominated in the Roman law *Locatio operis* is, as we have seen, subdivided into two others: 1. *Locatio operis Faciendi*; 2. *Locatio operis mercium vehendarum*.

§ 736. 1. *Locatio operis Faciendi*. This class consists either of *Locatio operis*, which is the hire of labor and services; or of *Locatio custodiae*, which is the custody of goods for a compensation. The undertaking of the former class is to do something, and of the second is to keep something. Bailees for hire of labor and services have a special property, sufficient to enable them to proceed in an action against wrongdoers.<sup>1</sup> In the hire of things, the bailee pays the compensation; in the hire of labor and services, the bailor pays the compensation.

§ 737. In the first place, as to *Locatio operis*.<sup>2</sup> The bailee of work for his hire is bound to observe only ordinary diligence, and is responsible for ordinary negligence in respect to the custody of the bailment.<sup>3</sup> He is also bound to exercise

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<sup>1</sup> Eaton *v.* Lynde, 15 Mass. 242; Barker *v.* Roberts, 8 Greenl. 101; Story on Bailm. § 422, *a*.

<sup>2</sup> See "The Law of Contracts for Works and Services," by David Gibbons, Esq., for a careful statement of the general rules of law, and a collection of the principal cases on this subject.

<sup>3</sup> Menetone *v.* Athawes, 3 Burr. 1592; Leck *v.* Maestaer, 1 Camp. R. 138;

an ordinary degree of skill, in relation to the business which he undertakes; to do his work in a workmanlike manner; to warrant himself to be possessed of sufficient skill properly to execute it. If he perform the work negligently, or unskillfully he is responsible to his employer in damages.<sup>1</sup> *Spondet peritiam artis.* *Imperatia culpæ adnumeratur.* For it is his own fault, if he either make an engagement without sufficient skill to execute it, or if, possessing the adequate skill, he do not exert it.<sup>2</sup> Thus, if a carpenter undertake to build a house, or a tailor to make a suit of clothes, or a farrier to cure a horse—each is bound not only to perform his undertaking with ordinary skill, but also to have the skill requisite to perform it.<sup>3</sup> So, also, the bailee is liable not only for *misfeasance*, but for *non-feasance*, if any loss or damage result to the hirer.<sup>4</sup> So, also, if the work to be done is one requiring great skill and knowledge, the bailee cannot do it by a substitute, because the presumption is, that his individual knowledge and ability constitute the consideration of the contract. Thus, if an artist

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Gamber *v.* Wolaver, 1 Watts & Serg. 60; Foster *v.* Taylor, 2 Brevard, R. 348.

<sup>1</sup> Broom *v.* Davis, 7 East, R. 479; Boorman *v.* Brown, 3 Adolph. & Ell. (N. S.) 511; Moneypenny *v.* Hartland, 2 Car. & Payne, 378; Pothier, *Contrat de Louage*, No. 427; *Traité des Obligations*, No. 163; Mondel *v.* Steel, 8 Mees. & Welsb. 858; Seare *v.* Prentice, 8 East, R. 352; Gladwell *v.* Steggall, 5 Bing. N. C. 733.

<sup>2</sup> Story on Bailm. § 431; Jones on Bailm. 22, 53, 62, 97, 98, 120, 121; Coggs *v.* Bernard, 2 Ld. Raym. 909; Moneypenny *v.* Hartland, 1 Car. & P. 352; 2 Car. & Payne, 378; Pothier, *Contrat de Louage*, n. 425; 1 Bell, Comm. 456 (5th ed.); Duncan *v.* Blundell, 3 Stark. 6; 3 Kent, Comm. Lect. 40, p. 588; Dig. Lib. 50, tit. 17, l. 132; Lib. 4, tit. 9, l. 5; Lib. 19, tit. 2, l. 9, § 5; Pothier, Pand. Lib. 19, tit. 2, n. 29; Boorman *v.* Brown, 3 Adolph. & Ell. (N. S.) 511.

<sup>3</sup> But if the employer know he has not the requisite skill, *quare.* Felt *v.* School District, 24 Verm. 297.

<sup>4</sup> Story on Bailm. § 436; Jones on Bailm. 101; 3 Black. Comm. 157; Elsee *v.* Gatward, 5 T. R. 143; Thorne *v.* Deas, 4 Johns. 84; M'Intyre *v.* Carver, 2 W. & S. 392; Morgan *v.* Congdon, 4 Comst. 551.

be engaged to paint a picture, he cannot turn the work over to one of his students.

§ 738. Every bailee for hire, has a lien on the article, in respect to which his work is done, for his compensation, unless there be a special agreement to the contrary; and he is not bound to surrender it until such compensation is paid.<sup>1</sup> But such lien is waived by permitting the property to go into the possession of the owner.<sup>2</sup>

§ 739. There is a distinction between cases where, 1st, the thing is to be created by a workman from his own materials, and 2d, where the workman furnishes materials and does work on a thing already existing, and 3d, where the workman makes a new thing out of materials furnished by the owner. In the first case, the thing never becomes the property of the person for whom it is making, until it is completely finished and delivered; and, therefore, if it be destroyed before its completion and delivery, the workman must bear the loss.<sup>3</sup> So, also, it is liable to be taken on execution by the creditors of the workman. In the second case, where the workman furnishes the materials for work to be done upon property belonging to his employer, the latter must bear not only the loss of the materials, but also the value of the work done thereupon.<sup>4</sup> Where, therefore, a ship which was undergoing repairs was accidentally burnt, it was held that the shipwright was entitled to compensation for his work and labor, as well as for the materials fur-

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<sup>1</sup> 5 Roll. Abr. 92 *m*, 1; *Blake v. Nicholson*, 3 M. & S. 167; *Chase v. Westmore*, 5 M. & S. 180; *Ex parte Deeze*, 1 Atk. 228; *Hollingsworth v. Dow*, 19 Pick. 228; *Barry v. Longmore*, 4 Perry & Dav. 344; *Story on Bailm.* § 440; *McIntyre v. Carver*, 2 Watts & Serg. 392. See also post, § 732 *d*.

<sup>2</sup> *Forth v. Simpson*, 13 Q. B. R. 680.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Story on Bailm.* § 438; 1 Bell, Comm. 458; Pothier, *Contrat de Louage*, n. 434. See post, § 515; *Menetone v. Athawes*, 3 Burr. R. 1592; *Gillett v. Mawman*, 1 Taunt. R. 137; *Story on Sales*, § 235; *Gregory v. Stryker*, 2 Denio, R. 628.

nished therefor by him previous to the loss.<sup>1</sup> But in the third case, where an order is given to manufacture a specific article, or to bring about a specific result, out of materials supplied by the orderer, and the contract is entire in its nature, if a loss occur before the whole contract is performed, the orderer loses his materials, and the workman his labor. Thus, if a man agree to make a coat, or to print a book, the price being to be paid on the completion of the job, the employer furnishing the cloth or paper, if any loss occur before the coat or printing is finished, the employer loses his materials and the workman his work.<sup>2</sup> So, also, as the materials belong to the supplier, it follows, that they are not liable to be levied on by any creditor of the manufacturer. Thus, where rags were delivered to a manufacturer to be made into paper, it was held, that trespass would lie against a creditor of the manufacturer for levying on the paper.<sup>3</sup> If the contract be divisible in its nature, and contemplate a payment proportioned to the labor of the workman, and the payment is not conditional upon the whole performance of the agreement, the workman would be entitled to receive a compensation for his labor in case of loss.<sup>4</sup> Where goods are to be manufactured out of the materials of the workman, and payment is to be made by certain instalments, payable at certain stages of the work, if, before the payment of the first instalment, the article be destroyed, the workman must bear the whole loss. If, between the payment of the different instalments, a loss occur, the workman loses the worth of his labor which is not already paid for, and the orderer loses the instalments he has made.<sup>5</sup>

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<sup>1</sup> *Menetone v. Athawes*, 1 Taunt. R. 137.

<sup>2</sup> *Gillet v. Mawman*, 1 Taunt. R. 140; *Adlard v. Booth*, 7 Car. & Payne, 108.

\* *King v. Humphreys*, 10 Barr, R. 217. See *Mallory v. Willis*, 4 Comst. 76; *Baker v. Woodruff*, 2 Barb. 520; 2 Comst. 153; *Wadsworth v. Allcott*, 2 Selden, 64; *Foster v. Pettibone*, 3 Selden, 433; *Buffum v. Merry*, 3 Mason, 478.

\* *Ibid.*

• • • <sup>•</sup> *Clarke v. Spence*, 4 Adolph. & Ell. 470; *Woods v. Russell*, 5 Barn. & Ald.

§ 740. It is often difficult to determine, in cases where the work is badly done, or is left unfinished, which party shall suffer the loss. And in the first place where, although finished, it is badly done, the rule is, that if there be an express agreement to make a thing in a particular manner, and the workman do not fulfil his engagement, the employer is not bound to take the thing.<sup>1</sup> Thus, where a contract was made to build a house for a certain sum, and to put therein certain joists and other materials of a given description and measurement, and the builder omitted to put them in; it was held that, not having performed his agreement according to its material terms, he could not recover any thing.<sup>2</sup> So, also, where a bridge was built so as to be useless, the same rule was held to apply.<sup>3</sup>

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912. See ante, § ; *Tripp v. Armitage*, 4 Mees. & Welsb. 687; *Carruthers v. Payne*, 5 Bing. R. 277; *Laidler v. Burlinson*, 2 Mees. & Welsb. 614; *Oldfield v. Lowe*, 9 Barn. & Cres. 73; *Story on Sales*, § 234, 235; *Denew v. Daverell*, 3 Camp. R. 451.

<sup>1</sup> *Ellis v. Hamlen*, 3 Taunt. 52; *Jennings v. Camp*, 13 Johns. 94; *McMillan v. Vanderlip*, 12 Johns. 165; *Cutter v. Powell*, 6 T. R. 320; *Thornton v. Place*, 1 Mood. & Rob. 218; *Cooke v. Munstone*, 4 B. & P. 355; 1 Bell, Comm. 456, 5th ed.; *Cousins v. Paddon*, 2 Cromp. Mees. & Rose. 547; *Burn v. Miller*, 4 Taunt. 745; *Taft v. Inhabitants of Montague*, 14 Mass. 282; *Jewell v. Schroeppe*, 4 Cow. 561; *Sickels v. Pattison*, 14 Wend. 257; *Sinclair v. Bowles*, 9 B. & C. 92; *Feeter v. Heath*, 11 Wend. 477.

<sup>2</sup> *Ellis v. Hamlen*, 3 Taunt. R. 52. In this case Mansfield, C. J., observed: "The defendant agrees to have a building of such and such dimensions; is he to have his ground covered with buildings of no use, which he would be glad to see removed, and is he to be forced to pay for them besides? It is said he has the benefit of the houses, and, therefore, the plaintiff is entitled to recover on a *quantum ralebant*. To be sure it is hard that he should build houses and not be paid for them; but the difficulty is to know where to draw the line; for if the defendant is obliged to pay in a case where there is one deviation from his contract, he may equally be obliged to pay for any thing, how far soever distant from what the contract stipulated for." See, also, *Sinclair v. Bowles*, 9 Barn. & Cres. 92; *Wooten v. Read*, 2 S. & M. R. 585. But see *Britton v. Turner*, 6 N. Hamp. R. 481.

<sup>3</sup> *Taft v. The Inhabitants of Montague*, 14 Mass. R. 282.

§ 740 a. Yet, if the subject-matter of the work be altogether created by the workman, as if it be to make a new thing, and not merely to repair an old one, so that the employer might refuse it, and he, nevertheless, accept it, and receive the benefit for it, it seems that he would be liable in a *quantum meruit*, although it were not performed according to the contract. Nor is it necessary in such case that such acceptance should be express, for it will be implied from the circumstances of the case, and it is incumbent on the employer expressly to refuse to accept the work. And especially would his assent to any variation from the contract be implied, when he was actually cognizant thereof and made no objection. But it would be only on the ground of an implied acceptance of the work actually done, that he would be responsible if it were contrary to the contract.<sup>1</sup>

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<sup>1</sup> Hayward *v.* Leonard, 7 Pick. R. 184. In this case H. contracted in writing to build a house for L., by a certain time, of certain dimensions, and in a certain manner, on L.'s land, and afterwards built the house within the time, of the dimensions agreed on, but in workmanship and materials varying from the contract. L. was present almost every day during the building, and had an opportunity of seeing all the materials and labor, and objected at times to parts of the materials and work, but continued to give directions about the house, and ordered some variations from the contract. He expressed himself satisfied with parts of the work from time to time, though professing to be no judge of it. Soon after the house was done he refused to accept it, but H. had no knowledge that he intended to refuse it, until after it was finished. It was held, that H. might maintain an action against L. on a *quantum meruit* for his labor, and on a *quantum valebant* for the materials. Chief Justice Parker, in his judgment, says: "In this case there is a great array of authorities on both sides, from which it appears very clearly that different judges and different courts have held different doctrines, and sometimes the same court at different times. The point in controversy seems to be this; whether when a party has entered into a special contract to perform work for another, and to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by an action on that contract, yet nevertheless the work and materials are of some value and benefit to the other contracting party, he may recover on a *quantum meruit* for the work and labor done, and on a *quantum valebant* for the materials. We think the weight of modern authority is in favor of the action, and that upon the whole

§ 740 b. If, however, the subject-matter on which the work is done be old, so that it could not be returned, as when a

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it is conformable to justice, that the party who has the possession and enjoyment of the materials and labor of another, shall be held to pay for them, so as in all events he shall lose nothing by the breach of contract. If the materials are of a nature to be removed and liberty is granted to remove them, and notice to that effect is given, it may be otherwise. But take the case of a house or other building fixed to the soil, not built strictly according to contract, but still valuable and capable of being advantageously used or profitably rented,—there having been no prohibition to proceed in the work after a deviation from the contract has taken place,—no absolute rejection of the building, with notice to remove it from the ground ; it would be a hard case indeed if the builder could recover nothing.

“ And yet he certainly ought not to gain by his fault in violating his contract, as he may, if he can recover the actual value ; for he may have contracted to build at an under price, or the value of such property may have risen since the contract was entered into. The owner is entitled to the benefit of the contract, and therefore he should be held to pay in damages only so much as will make the price good, deducting the loss or damage occasioned by the variation from the contract. As in the case of Smith against the proprietors of a meeting-house in Lowell, determined at March term, 1829, in Suffolk. 8 Pick. R. 178. . . . It is laid down, as a general position in Buller’s *Nisi Prius*, 139, that if a man declare upon a special contract and upon a *quantum meruit*, and prove the work done, but not according to the contract, he may recover on the *quantum meruit*, for otherwise he would not be able to recover at all. Mr. Dane (vol. 1, p. 228) disputes this doctrine, and thinks it cannot be law unless the imperfect work be accepted. Buller makes no such qualification ; and yet it would seem to be reasonable that if the thing contracted for was a chattel, the party for whom it was made ought not to be held to take it and pay for it, unless it is made according to the contract, as a ship, a carriage, &c. ; and this principle seems to be of common use in regard to articles of common dealing, such as wearing apparel, tools, and implements of trade, ornamental articles, furniture, &c. There seems to be, however, ground for distinction in the case of buildings erected upon the soil of another, for in such case the owner of the land necessarily becomes owner of the building. The builder has no right to take down the building or remove the materials ; and though the owner may at first refuse to occupy, he or his heirs or assignees will eventually enjoy the property. And in such cases the doctrine of Buller is certainly not unreasonable. The case put by Buller to illustrate his position, is that of a house built on contract, but not according to it.

“ Mr. Dane’s reasoning is very strong in the place above cited, and subse-

workman is employed to repair a thing, the employer would not be liable for a *quantum meruit*, if the work were not done properly or according to the contract.<sup>1</sup>

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quently in vol. 2, p. 45, to show that the position of Buller, in an unlimited sense, cannot be law; and some of the cases he puts are decisive in themselves. As if a man who had contracted to build a brick house, had built a wooden one, or instead of a house, the subject of the contract, had built a barn. In these cases, if such should ever happen, the plaintiff could recover nothing without showing an assent or acceptance, express or implied, by the party with whom he contracted. Indeed such gross violations of contract could not happen without fraud, or such gross folly as would be equal to fraud in its consequences. When we speak of the law allowing the party to recover on a *quantum meruit* or *quantum valebant*, where there is a special contract, we mean to confine ourselves to cases in which there is an honest intention to go by the contract, and a substantive execution of it, but some comparatively slight deviations as to some particulars provided for. Cases of fraud or gross negligence may be exceptions.

"In looking at the evidence reported in this case, we see strong grounds for an inference that the defendant waived all exceptions to the manner in which the work was done. He seems to have known of the deviations from the contract,—directed some of them himself,—suffered the plaintiff to go on with his work,—made no objection when it was finished, nor until he was called on to pay. But the case was not put to the jury on the ground of acceptance or waiver, but merely on the question, whether the house was built pursuant to the contract or not; and if not, the jury were directed to consider what the house was worth to the defendant, and to give that sum in damages. We think this is not the right rule of damages; for the house might have been worth the whole stipulated price, notwithstanding the departures from the contract. They should have been instructed to deduct so much from the contract price as the house was worthless on account of these departures." See, also, *Smith v. Lowell*, 8 Pick. R. 178; *Olmstead v. Beale*, 19 Pick. R. 528; *Hayden v. Madison*, 7 Greenl. R. 76; *Jennings v. Camp*, 13 Johns. R. 94; *Kettle v. Harvey*, 21 Verm. R. 301; *Snow v. Ware*, 13 Metcalf, R. 42; *Farnsworth v. Garrard*, 1 Camp. 38; *Basten v. Butter*, 7 East, 479; *Cutler v. Close*, 5 Car. & P. 337; *Thornton v. Place*, 1 Mood. & Rob. 218; *Grant v. Button*, 14 Johns. 377. See *Mondel v. Steel*, 8 Mees. & Welsb. R. 858; *Story on Bailm.* § 426, 437, 441; *Dubois v. Del. & Hudson Canal Co.* 4 Wend. 285; 1 Bell, Comm. 456; *Bracey v. Carter*, 12 Adolph. & Ell. 373; *Lewis v. Samuel*, 8 Q. B. 685.

<sup>1</sup> *Ibid.*; *Eldridge v. Rowe*, 2 Gilm. R. 91; *Miller v. Goddard*, 34 Maine R. 102; *Olmstead v. Beale*, 19 Pick. R. 529; *Davis v. Maxwell*, 12 Metcalf, R. 286.

§ 740 c. Again, under a general agreement to make a thing, the workman impliedly warrants that he has sufficient skill to make it properly, and if it be wholly unfit for the purpose for which it was designed, he cannot compel his employer to take it.<sup>1</sup> Thus, where a workman undertook to rebuild the front of a house and built it so out of the perpendicular that it required to be taken down,<sup>2</sup>—and where a workman agreed to erect a stove in a shop and to lay a tube under the floor to carry off the smoke, and the plan utterly failed so that the stove could not be used,<sup>3</sup>—it was held that neither was entitled to any remuneration. So, also, the same rule applies to work done upon a bailment, owned by the bailor. If the work done be of no value, the bailor is not bound to pay for it; if it be absolutely injurious, the workman is responsible, whenever his contract is to do the thing well and skilfully.<sup>4</sup>

§ 741. When the work is left unfinished, the only question is, whether the contract was an entirety. If the agreement were, that the *whole* should be done, as if the work be contracted for by the job, the performance of the whole is a condition precedent to a recovery of any part of the compensation by the workman. But if the contract be severable, as if it be to do the work by the day, the workman will be entitled to a compensation *pro tanto*, although he leave the work unfinished, unless his omission or refusal to complete it operate as an injury or damage to the employer; in which case the

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<sup>1</sup> Jones *v.* Bright, 5 Bing. R. 535; Gray *v.* Cox, 4 Barn. & Cres. 108; Channer *v.* Hopkins, 4 Mees. & Welsb. 399; Ollivant *v.* Bayley, 5 Adolph. & Ell. (n. s.) 289; Shepherd *v.* Pybus, 4 Scott, (n. s.) 444; post, § 537, § 538, § 973.

<sup>2</sup> Farnsworth *c.* Garrard, 1 Camp. R. 38.

<sup>3</sup> Duncan *v.* Blundell, 3 Stark. R. 6.

<sup>4</sup> Duncan *v.* Blundell, 3 Stark. R. 6; Hayselden *v.* Staff, 5 Adolph. & Ell. 161; Duffit *v.* James, cited 7 East, R. 481; Basten *v.* Butter, 7 East, R. 479; Bracey *v.* Carter, 12 Adolph. & Ell. 373; Moneypenny *v.* Hartland, 1 Car. & Payne, 352; s. c. 2 Car. & Payne, 378; Broom *v.* Davis, 7 East, R. 479; Boorman *v.* Brown, 3 Adolph. & Ell. (n. s.) 511.

damage must be deducted from the claim of the workman.<sup>1</sup> In such a case he will be especially entitled to a compensation *pro tanto*, if the completion of the work be prevented by unavoidable accident, or by the fault of the employer. So, also, although the contract be entire, if it be either expressly or impliedly rescinded by the parties, the workman may recover *pro tanto* for the work done.<sup>2</sup> So, also, where the workman has deviated from the contract, by doing work not contemplated therein, he will not be entitled to any compensation, although the value of the thing be thereby increased, unless there be an express or implied assent to it, and then he can recover on a *quantum meruit* for such additional work.<sup>3</sup>

#### DEPOSITS FOR HIRE.

§ 742. 2. We now come to the consideration of bailments of *Locatio Custodiæ*, or deposits for hire; and bailees of this class are responsible, like other bailees, who receive a reciprocal benefit from the bailment, for ordinary care and diligence, and are responsible only for ordinary negligence.<sup>4</sup> Of this class are agistors of cattle, warehouse-men, forwarding merchants, and wharfingers.<sup>5</sup> As the general rules applicable to bailments

<sup>1</sup> Sinclair *v.* Bowles, 9 B. & C. 92; Faxon *v.* Mansfield, 2 Mass. 147; Roberts *v.* Havelock, 3 Barn. & Adolph. 404.

<sup>2</sup> Robson *v.* Godfrey, 1 Stark. 275; Raymond *v.* Bearnard, 12 Johns. 274; Koon *v.* Greenman, 7 Wend. 121; Dubois *v.* Del. & Hudson Canal Co. 4 Wend. 285; Linningdale *v.* Livingston, 10 Johns. 36; Burne *v.* Miller, 4 Taunt. 745; Hollinshead *v.* Mactier, 13 Wend. 276. See ante, *Entire and Divisible Contracts*, § 22 a.

<sup>3</sup> Wilmot *v.* Smith, 3 Car. & Payne, 453; Lovelock *v.* King, 1 Mood. & Rob. 60; Bank of Columbia *v.* Patterson, 7 Cranch, 299; s. c. 2 Peters, Cond. R. 501; Robson *v.* Godfrey, 1 Stark. 275; s. c. 1 Holt, R. 236; Pepper *v.* Burland, Peake, 103. See ante, *Express and Implied Contracts*.

<sup>4</sup> Finucane *v.* Small, 1 Esp. R. 315; Cailiff *v.* Danvers, 1 Peake, N. P. C. 114. See Cairns *v.* Robins, 8 Mees. & Welsb. 258.

<sup>5</sup> Platt *v.* Hibbard, 7 Cow. 497; 2 Story, Eq. Jurisp. § 814-816; Ross *v.* Johnson, 5 Burr. 2827; Garside *v.* Trent and Mersey Navigation Co. 4 T. R.

of *locatio operis faciendi*, first considered, are also applicable to these contracts, it will not be necessary to restate them here, except in some particulars.

§ 742 a. In respect to all bailees of this class, the rule is, that they are bound only to take reasonable and ordinary care of the bailment. They are not, therefore, liable for thefts, or destruction by vermin, or injury of any kind, unless it grew out of their negligence.<sup>1</sup> Thus, where goods were stored for hire and were injured by oil through the carelessness of the warehouse-man, and were afterwards nearly ruined by a flood, against which he had taken all precautions, it was held that for the first injury he was liable, and not for the second.<sup>2</sup> So, also, there is an implied engagement on the part of a forwarding merchant, that he will be vigilant and careful in receiving and forwarding goods intrusted to his care; and upon his refusal to receive goods consigned to him, he would be liable for any loss accruing therefrom.<sup>3</sup> But if a warehouse-man receive goods, and it prove that the bailor has no title, and they are taken from the custody of the warehouse-man by the authority of the law, as the property of some third person, the warehouse-man may, by showing such fact, avoid all responsibility in an action brought against him by the bailor for loss of the goods.<sup>4</sup>

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581; *Forward v. Pittard*, 1 T. R. 27; *Story on Bailm.* § 443-456; *Gosling v. Birnie*, 7 Bing. 339; *Maving v. Todd*, 1 Stark. 72; *Sidaways v. Todd*, 2 Stark. 400; *In the matter of Webb*, 8 Taunt. 443; *Cobban v. Downe*, 5 Esp. 41; *Foote v. Storrs*, 2 Barbour, 326; *Clarke v. Spence*, 10 Watts, 335; *Blin v. Mayo*, 10 Verm. R. 56.

<sup>1</sup> *Story on Bailm.* § 444, and cases cited. *Cailiff v. Danvers*, Peake, R. 114; *Knapp v. Curtis*, 9 Wend. R. 60; *Hatchett v. Gibson*, 13 Ala. R. 587.

<sup>2</sup> *Powers v. Mitchell*, 3 Hill, R. 515. See, also, *Chenowith v. Dickinson*, 8 B. Monroe, R. 156.

<sup>3</sup> *Hemphill v. Chenie*, 6 Watts & Serg. 62. See *Roberts v. Turner*, 12 Johns. R. 232.

<sup>4</sup> *Burton v. Wilkinson*, 18 Verm. R. (3 Washb.) R. 186.

§ 742 b. The implied contract of a bailor of this class may also be enlarged by express stipulations. Thus, where a warehouse-man agrees to deposit cotton in a fire-proof building, and a loss of it occurs by reason of its not being so deposited, he will be liable, unless, indeed, the depositor, after the contract, consent that the goods be otherwise stored.<sup>1</sup>

§ 742 c. A warehouse-man has also a specific, though not a general lien. But he may deliver a part and retain the residue for the price chargeable on all goods received by him under the same contract of bailment, provided the ownership of the whole be in the same person.<sup>2</sup> So, also, the same lien belongs to a wharfinger.<sup>3</sup> And in principle it would seem that the same right ought to adhere to all bailees of this class. Undoubtedly, where labor and skill have been expended on a bailment, a specific lien would be created; but it seems questionable whether this doctrine would obtain in all cases where no additional value has been conferred upon the bailment, either directly or indirectly.<sup>4</sup> An exception certainly is admitted in the case of agistors of cattle and livery-stable keepers, who are held not to possess a lien for food or pasturage,<sup>5</sup> unless by special agreement.<sup>6</sup> This exception has long obtained in England, and has recently been affirmed in this country.<sup>7</sup> A distinction, however, has been taken between the mere *keeper* and the *trainer* or breaker of a horse, in favor of the

<sup>1</sup> Hatchett v. Gibson, 13 Ala. R. 587.

<sup>2</sup> Steinman v. Wilkins, 7 Watts & Serg. 466.

<sup>3</sup> Ibid. Rex v. Humphrey, 1 McLell. & Young, 194, 195.

<sup>4</sup> Bevan v. Waters, 1 Mood. & Malk. 235; Scarfe v. Morgan, 4 Mees. & Welsb. 279; Jackson v. Cummings, 5 Mees. & Welsb. 342.

<sup>5</sup> Wallace v. Woodgate, 1 Car. & Payne, 575; Scarfe v. Morgan, 4 Mees. & Welsb. 279; Bevan v. Waters, 3 Car. & Payne, 520; Judson v. Etheridge, 1 Cromp. & Mees. 743; Jackson v. Cummings, 5 Mees. & Welsb. 342; Jacobs v. Latour, 5 Bing. R. 130; Saunderson v. Bell, 2 Mees. & Welsb. 304.

<sup>6</sup> Wallace v. Woodgate, 1 Car. & Payne, 575; s. c. Ryan & Mood. 193.

<sup>7</sup> Grinnell v. Cook, 3 Hill, R. 492; Miller v. Marston, 35 Maine R. 155; Bass v. Pierce, 16 Barb. R. 597.

latter, on the ground that he gives additional value to the animal by the application of labor and skill.<sup>1</sup> So, a farrier has a lien upon a horse left with him to be kept *and cured*.<sup>2</sup> On the same principle a farmer has been held to have a lien upon a mare taken by him to keep, for the charge of covering by his stallion. A further reason for the exception of agistors of cattle and livery-stable keepers from the right to a lien is thus stated by Mr. Justice Bronson in a late American case:<sup>3</sup> "When horses are kept at livery, the owner takes and uses them at pleasure, and the bailee only has a lien as long as he retains the uninterrupted possession. If the owner gets the property into his hands without fraud, the lien is at an end, and will not be revived by the return of the goods."<sup>4</sup>

§ 742 d. The liability of a warehouse-man commences from the moment that the goods arrive at the warehouse, and the crane is applied to raise them into it; and if, while they are raising, the tackle break, and they be precipitated into the street, to their injury or destruction, the warehouse-man is liable therefor, and not the common carrier, although he be upon the spot.<sup>5</sup> A warehouse-man is bound to deliver the goods intrusted to his care, to the right owner, to retain them until they are demanded of him. If, therefore, either he or his servant, through inadvertence or negligence, deliver the goods bailed to a person not entitled to receive them, he will be responsible for all losses resulting thereby;<sup>6</sup> or if, through negligence, the goods are not delivered when called for by the

<sup>1</sup> Bevan *v.* Waters, 3 Car. & Payne, 520; Judson *v.* Etheridge, 1 Cromp. & Mees. 743, and cases above cited; Forth *v.* Simpson, 13 Q. B. R. 680.

<sup>2</sup> Lord *v.* Jones, 24 Maine R. 439.

<sup>3</sup> Grinnell *v.* Cook, 3 Hill, R. 492.

<sup>4</sup> See, also, Bevan *v.* Waters, 3 Car. & Payne, 520; Jackson *v.* Cummings, 5 Mees. & Welsb. 342.

<sup>5</sup> Thomas *v.* Day, 4 Esp. 262; De Mott *v.* Laraway, 14 Wend. 225; Randle-son *v.* Murray, 8 Ad. & Ell. 109.

<sup>6</sup> Lubbock *v.* Inglis, 1 Stark. 104; Story on Bailm. § 450; Leigh *v.* Smith, 6 Car. & Payne, 638, 641; Willard *v.* Bridge, 4 Barb. R. 361.

consignor, and are afterwards destroyed by fire, he would be responsible.<sup>1</sup> But if they are taken from his possession by authority of law, we have already seen that this is a good defence to any claim by the bailor.<sup>2</sup>

§ 743. The established rule in England is, that when an action is brought against depositaries for hire, to recover for a loss of or injury done to the bailment, the *onus probandi* of negligence is upon the plaintiff.<sup>3</sup> In America, this doctrine has not met with entire approbation; and although it has been affirmed in some of the States, in others it does not obtain. The weight of authority, however, would seem to incline to the English rule.<sup>4</sup>

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<sup>1</sup> Stevens *v.* Boston & Maine Railroad, 1 Gray, R. 277.

<sup>2</sup> Burton *v.* Wilkinson, 18 Verm. R. 186.

<sup>3</sup> Finucane *v.* Small, 1 Esp. 316; Harris *v.* Packwood, 3 Taunt. 267; Marsh *v.* Horne, 5 B. & C. 322; Story on Bailm. § 278, 339, 410, 454, 529.

<sup>4</sup> The English rule was denied in Piatt *v.* Hibbard, 7 Cowen, R. 501, but this case was subsequently overruled in Foote *v.* Storrs, 2 Barb. S. C. R. 329. In this case the court say: "In the case of Platt et al. *v.* Hibbard et al. 7 Cowen, R. 497, tried before Walworth, circuit judge, at the Clinton Circuit, in January, 1827, the learned judge, in his charge to the jury, said that 'when property intrusted to a warehouse-man, wharfinger, or storing and forwarding merchant, in the ordinary course of business, is lost, injured, or destroyed, the weight of proof is with the bailee to show a want of fault or negligence on his part; or, in other words, to show the injury did not happen in consequence of his neglect to use all that care and diligence on his part that a prudent or careful man would exercise in relation to his own property.' That was an action against the defendants, as warehouse-men, for property destroyed by the burning of their warehouse; and as the jury, notwithstanding the charge, found a verdict for the defendants, and the plaintiffs moved for a new trial in the case, the soundness of the charge of the learned judge could not be brought in question. It was not approved, nor, indeed, adverted to by the court in giving judgment. By refusing to grant a new trial, the inference is that they were satisfied with the verdict. Although the reporter added a note, questioning the charge of the circuit judge, the case has, nevertheless, been cited elsewhere, as an authority for the rule which casts the burden upon the bailee, of establishing an excuse, upon proof of loss of the goods. See Clarke *v.* Spence, 10 Watts, 335. But the rule in this State is believed to be other-

wise. In Schmidt *v.* Blood, 9 Wend. 268, it was expressly ruled that with respect to *warehouse-men* the onus of showing negligence rests on the owner. The liability of a *wharfinger* is not distinguishable from that of a *warehouse-man*. Both are bound only to take common and reasonable care of the commodity intrusted to them. Story, Bailm. § 450 to 457, § 444 to 452. We are not aware of any adjudged case that makes a wharfinger liable for slight neglect, or that attempts to put him upon the footing of a common carrier. The reason and policy of the law, with respect to the liability of the latter for all injuries except such as arise from the act of God and the public enemy, are inapplicable to the former. In all cases, where a defendant is bound only to ordinary care, and is liable only for ordinary neglect, the plaintiff cannot recover upon the mere proof of loss of the articles intrusted to the bailee. He must give some evidence of a want of care in the bailee, or his servants." See, also, Schmidt *v.* Blood, 9 Wend. R. 268. In Bush *v.* Miller, 13 Barb. R. 482, it is said that the bailee must give some account of the property before he can call upon the plaintiff to prove negligence. In Pennsylvania the English rule does not obtain. See Logan *v.* Mathews, 6 Barr, R. 417. And see, also, Clarke *v.* Spence, 10 Watts, R. 335; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275; Beckman *v.* Shouse, 5 Rawle, R. 179. In Tennessee the English doctrine is held. Runyan *v.* Caldwell, 7 Humph. R. 134. See, also, Story on Bailm. § 278, § 339, § 410, § 454, § 529; Beardslee *v.* Richardson, 11 Wend. R. 25; Ante, § 732.

## CHAPTER IX.

## INNKEEPERS.

§ 744. AN innkeeper is a person who keeps open house, and supplies the public with board and lodging for hire.<sup>1</sup> A private boarding-house,<sup>2</sup> lodging-house, or a coffee-house, is not an inn.<sup>3</sup> If a man put up a sign at his door, and harbor guests, his house is to be deemed a common inn ; the sign is not, however, essential to constitute an inn, but only evidence of the nature of the house ; and if, after the sign be taken down, the host continue to entertain travellers, the house is a common inn.<sup>4</sup> So, also, entertaining strangers, occasionally, for

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<sup>1</sup> An inn is stated by Mr. Justice Best to be “ a house, the owner of which holds out that he will receive all travellers and sojourners, who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be kept. A lodging-house keeper, on the other hand, makes a contract with every man that comes ; whereas an innkeeper is bound, without making any special contract, to provide lodging and entertainment for all at a reasonable price.” *Thompson v. Lacy*, 3 Barn. & Ald. 287. See, also, on this point, *State v. Chamblyss*, 1 Cheves, (S. C.) R. 220 ; *Wintermute v. Clarke*, 5 Sandf. 247 ; *Doe v. Laming*, 4 Camp. N. P. C. 77 ; *Bonner v. Welborn*, 7 Georgia R. 309.

<sup>2</sup> See *Dansey v. Richardson*, 25 Eng. Law & Eq. R. 76. And see *Parkhurst v. Foster*, 5 Mod. 427 ; 1 Salk. 387 ; *Bonner v. Welborn*, 7 Georgia, 296. See post, § 749 *a*.

<sup>3</sup> Calye's case, 8 Co. R. 32 ; *Thompson v. Lacy*, 3 B. & Ad. 283 ; *Parkhurst v. Foster*, 1 Salk. 387 ; s. c. Carth. 417 ; Bac. Abr. Inns and Innkeepers, B. ; Story on Bailm. § 475 ; *Doe v. Laming*, 4 Camp. 77.

<sup>4</sup> *Parker v. Flint*, 12 Mod. R. 255 ; 2 Rolle, R. 344.

compensation, does not constitute a person an innkeeper.<sup>1</sup> He is bound to receive all guests who come, unless they are drunk, or disorderly, or afflicted with contagious diseases; to accommodate them with board and convenient lodging-rooms; to take proper care of their goods and baggage; and to supply their reasonable wants and requests, for a reasonable compensation.<sup>2</sup> But he is not bound to receive the goods of a person who purposes to use his inn as a place of deposit, and not to lodge there as his guest.<sup>3</sup> If an innkeeper refuse improperly to receive or provide for a guest, he may be indicted therefor;<sup>4</sup> unless he have a sufficient objection to his personal character or conduct. But if such person be disorderly, he may not only refuse to receive him, but after he has received him, he may eject him from the house.<sup>5</sup> Travellers must, however, conform to the reasonable regulations of the house, and the reasonable requests of the innkeeper.<sup>6</sup> Thus, where an innkeeper in a town through which lines of stage-coaches pass, and at whose inn the coaches stop, permits the drivers of some of the lines to resort there, without objection, he cannot exclude the driver of a rival line from entering the inn and going into the public rooms to solicit passengers for his coach, provided there be a reasonable expectation that passengers are there, and provided he comes at a suitable time, conducts himself with propriety, and is doing no injury to the innkeeper.<sup>7</sup> But this right may be forfeited by misconduct;

<sup>1</sup> *The State v. Mathews*, 2 Dev. & Bat. 424; *Parker v. Flint*, 12 Mod. R. 255; *Thompson v. Lacy*, 3 Barn. & Ad. 283; *Lyon v. Smith*, 1 Morris, 184.

<sup>2</sup> *Fell v. Knight*, 8 Mees. & Welsb. R. 269; *Story on Bailm.* § 476; *Howell v. Jackson*, 6 Car. & Payne, 725; *Newton v. Trigg*, 1 Show. R. 246; *Hawthorn v. Hammond*, 1 C. & K. 404.

<sup>3</sup> *Watbroke v. Griffith*, Mod. R. 876; *Bennett v. Mellor*, 5 T. R. 273; *Binns v. Pigot*, 9 Car. & Payne, 208.

<sup>4</sup> *Rex v. Ivens*, 7 Car. & Payne, 213.

<sup>5</sup> *Ibid.* *Story on Bailm.* § 470, and cases cited; *Howell v. Jackson*, 6 Car. & P. 723.

<sup>6</sup> *Fell v. Knight*, 8 Mees. & Welsb. R. 269.

<sup>7</sup> *Markham v. Brown*, 8 N. Hamp. R. 523.

and if affrays be thereby occasioned, or if the guests be disturbed through the fault of such drivers, the innkeeper may, if it appear to be necessary for the protection of his guests or himself, prohibit the driver from entering, until the grounds of apprehension shall be removed, and may treat him as a trespasser, in case he enter after such prohibition.<sup>1</sup> But if other parties be guilty of misconduct to him, and he be engaged in an affray merely for self-defence, the innkeeper could not exclude him, except at the time of the disturbance, and for the purpose of restoring quiet to the house.<sup>2</sup>

§ 744 a. The true definition of an inn has been said, in a late case, to be “a house where the traveller is furnished with every thing which he has occasion for whilst on his way;”<sup>3</sup> and in a more recent case it has been defined to be “a public-house of entertainment for all who choose to visit it.”<sup>4</sup> It may, however, be questioned whether an innkeeper is not authorized to restrict the use of his inn to certain classes of persons,—as in the case of the “*loges à pied*” met with throughout France, and intended for foot travellers only,—and if so, he should not be liable for refusing to receive and entertain persons travelling in carriages, and of a different class from those whom he professes to receive. This rule undoubtedly applies to carriers, and it has been thought that upon principle it should be extended to innkeepers.<sup>5</sup>

§ 745. An innkeeper has a lien upon all the property of his guest, in the inn and its stables, for all his expenses. The lien does not, however, extend to the person of his guest, or to the personal clothing he has on;<sup>6</sup> and it only exists while the

<sup>1</sup> *Markham v. Brown*, 8 N. Hamp. R. 523.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Thompson v. Lacy*, 3 Barn. & Ald. 283.

<sup>4</sup> *Wintermute v. Clarke*, 5 Sandf. R. 247.

<sup>5</sup> See *Johnson v. Midland Railway Co.* 4 Excheq. R. 367.

<sup>6</sup> *Sunboly v. Alford*, 1 Horn & Hurl. 13; Bac. Abr. Inns and Innkeepers,

owner of the goods in respect of which it is claimed, is actually or constructively a guest. It does not attach upon the property of a *boarder*.<sup>1</sup> But it is not necessary that he should actually be *infra hospitium* at the time the loss happens or the lien accrues; for if a traveller leave his horse at the inn and go out to dine or lodge with a friend, or if he leave the town for a short time, intending to return, and leave his goods at the inn, he would still continue to be a guest, if the host is to receive a compensation for care and keeping, so as to support the lien of the innkeeper.<sup>2</sup> So, also, if a traveller should send forward his horse or baggage, with a message that he was coming himself, it would seem, that he would become thereby a guest, from the time of the arrival of the baggage; at least, in case he afterwards arrives.<sup>3</sup> It has been held, that it is not essential that a traveller should be a lodger or take refreshment at an inn in order to constitute him a guest; and that if he leaves his horse there, or sends him without even going there himself, he may be considered as a guest, if the innkeeper is to receive compensation for the keeping.<sup>4</sup> But this last doctrine has been denied with considerable emphasis in a late case.<sup>5</sup> And, indeed, it is very difficult to see how an innkeeper

D.; *Rosse v. Bramsteed*, 2 Roll. 439; *Thompson v. Lacy*, 3 B. & Ad. 283; *Procter v. Nicholson*, 7 Car. & P. 67; *Jones v. Thurloe*, 8 Mod. 172.

<sup>1</sup> *Ewart v. Stark*, 8 Richardson, 423.

<sup>2</sup> *Grinnell v. Cook*, 3 Hill, R. 489; *Yorke v. Grenaugh*, 2 Lord Raym. R. 866; s. c., under the name of *York v. Grindstone*, 1 Salk. R. 388; *Gelley v. Clerk*, Cro. Jac. 188; *Peet v. McGraw*, 25 Wend. R. 653.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Mason v. Thompson*, 9 Pick. R. 280. See *Berkshire Woollen Co. v. Proctor*, 7 Cush. R. 425.

<sup>5</sup> *Grinnell v. Cook*, 3 Hill, R. 489. See, also, *Smith v. Dearlove*, 12 Jur. 377; s. c. 6 Comm. B. Rep. 132; *Thickstun v. Howard*, 8 Blackf. R. 535; *Wintermute v. Clarke*, 5 Sandf. R. 242; *McDonald v. Edgerton*, 5 Barbour, R. 560. But see the very elaborate and able opinion of Chief Justice Redfield of Vermont, in support of *Mason v. Thompson*, in the late case of *McDaniels v. Robinson*, 26 Verm. R. 316; and *Hawley v. Smith*, 25 Wend. 642, where an innkeeper was held not to be liable in his character as innkeeper, where

can in such case be considered as occupying any other relation to the traveller than that of a mere bailee for hire, responsible only for ordinary diligence.<sup>1</sup> Yet, if a traveller be received at

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sheep put to pasture under the direction of the guest, are injured by eating poisonous plants.

<sup>1</sup> See the case of *Mason v. Thompson*, 9 Pick. R. 280. In this case, a traveller, without ever going to an inn, sent her horse and harness there to be kept, while she was on a visit to a friend. After four days, on sending for them, the harness was missing; and in an action against the innkeeper, he was held to have all the liabilities of an innkeeper. The court say, in their judgment: "It was urged, that neither the plaintiffs nor their servant were the defendant's guests, as neither of them had diet or lodging at his inn. But it is clearly settled that to constitute a guest, in legal contemplation, it is not essential that he should be a lodger or have any refreshment at the inn. If he leaves his horse there, the innkeeper is chargeable on account of the benefit he is to receive for the keeping of the horse. Lord Holt held a different opinion, in the case of *York v. Greenaugh*, 2 Ld. Raym. 866; but the opinion of the majority of the court has ever since been considered as well-settled law." It is very true that the inkeeper is chargeable as bailee for hire, but why chargeable as innkeeper? If a horse be sent by a traveller to a livery-stable, there to be kept, it is to be understood, that if the owner happen also to keep an inn with which the stable is annexed, he assumes the extraordinary liabilities of an innkeeper; while, if the stable do not happen to be connected with an inn and owned by an innkeeper, the stable-keeper is only a bailee for hire, the apparent contract being in both cases alike? By far the better doctrine seems to have been held in *Grinnell v. Cook*, 3 Hill, R. 489, where an action on the case was brought by Grinnell, an innkeeper, against the defendant Cook, for taking and selling on execution certain horses belonging to a third party named Tyler, which were kept in A.'s stable, without paying the bill for their keeping. The court say, in delivering their judgment in this case: "The innkeeper is bound to receive and entertain travellers, and is answerable for the goods of the guest, although they may be stolen or otherwise lost without any fault on his part. Like a common carrier, he is an insurer of the property, and nothing but the act of God or public enemies will excuse a loss. On account of this extraordinary liability, the law gives the innkeeper a lien on the goods of the guest for the satisfaction of his reasonable charges. It was once held that he might detain the person of the guest, but that doctrine is now exploded, and the lien is confined to the goods. The inquiry then is, whether the plaintiff received and kept the horses as an innkeeper? In other words, was he bound to receive and take care of them, and would he have

an inn as a guest, and take his room and leave his luggage there, and then go to a friend's house to stay, and do not return

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been answerable for the loss if the horses had been stolen without any negligence on his part? The lien and the liability must stand or fall together. Innkeepers cannot claim the one with any just expectation of escaping the other.

"Tyler, who owned the property, was not a traveller, nor was he in any sense a guest in the plaintiff's house; and I think it quite clear that the plaintiff was not bound to receive and take care of the horses. We are referred to the case of *Peet v. McGraw*, 25 Wend. 653, to prove that it is not necessary to the lien, or the liability of the innkeeper, that the owner should be a guest. The case decides no such thing. It turned on the construction of the plea, and we thought the words of the plea equivalent to an averment that the owner was a guest. A single expression of the chief justice, which was not necessary to the decision of the cause, is separated from the context, and pressed into the plaintiff's service. But neither the chief justice nor any other member of the court intended to say, that either the lien or the liability could exist where the owner of the goods was not either actually or constructively the guest of the innkeeper. There must be such a relation; but it is not necessary to its existence that the owner of the goods should be actually *infra hospitium* at the time the loss happened, or the lien accrued. For example, if a traveller leave his horse at the inn, and then go out to dine or lodge with a friend, he does not thereby cease to be a guest, and the rights and liabilities of the parties remain the same as though the traveller had not left the inn. And if the owner leave the inn and go to another town, intending to be absent two or three days, it seems that the same rule holds good, so far as relates to property for the care and keeping of which the host is to receive a compensation; but it is otherwise in relation to inanimate property, from which the host derives no advantage, and if that be stolen during such absence of the guest, the innkeeper will not be answerable. *Gelley v. Clerk*, Cro. Jac. 188; s. c. Noy, 126; *Yorke v. Grenaugh*, 2 Ld. Raym. 866; s. c. 1 Salk. 388, by the name of *York v. Grindstone*; Bac. Abr. Inns and Innkeepers, C. 5, 7th Lond. ed. The case of *Mason v. Thomson*, 9 Pick. 280, goes still further. There the traveller never went to the inn, but stopped as a visitor with a friend, and sent her horse and carriage to the inn. After four days she sent for the property, and found that a part of it had been stolen; but still the innkeeper was held liable. This case rests on the dictum of Powell and Gould, Js. against the opinion of Lord Holt, in *Yorke v. Grenaugh*, 2 Ld. Raym. 866, that 'if a man set his horse at an inn, though he lodge in another place, that makes him a guest, and the innkeeper is obliged to receive him [the horse]; for the innkeeper gains by the horse, and therefore makes

to the inn, but still continue to pay for his room, he would remain a guest, so that the innkeeper would have a lien and also

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the owner a guest though he was absent.' But the decision turned on the construction of the avowry, and the proper mode of pleading. The two judges held, 'that since the matter shown makes it appear that he was a guest, it is enough, though it is not expressly averred that he was a guest.' But Holt said: 'This matter is but evidence of it, that he was a guest, and is not traversable; but guest or not, is the most material part of the avowry, and traversable; and therefore there ought to be a positive averment that he was a guest.' This is not all. The two judges gave as the authority for their dictum the case of *Robinson v. Walter*, Poph. Rep. 127. The point there decided was, that the innkeeper had a lien on the plaintiff's horse, although the animal was brought to the inn by one who took him wrongfully. And that is good law at this day, if the innkeeper have no notice of the wrong, and act honestly. *Johnson v. Hill*, 3 Stark. R. 172. He is bound to receive the guest, and cannot stop to inquire whether he is the right owner of the property he brings. But not one word was said in the case of *Robinson v. Walter*, in support of the position that the owner or person who brings the property need not be a guest. The subject was not even mentioned, so far as appears by the report in Popham. But by the report of the same case in 3 Bulst. 269, it appears affirmatively that the wrongdoer who brought the horse to the inn actually became a guest, and afterwards went away, leaving the horse behind. Now, when a man, after he has actually become a guest and delivered his property to the host, goes away for a brief period, leaving his goods behind him, the law is chargeable with no absurdity in considering him as still continuing a guest, so far as relates to the rights and liabilities of the parties. And if one send his horse or his trunk in advance to the inn, saying he will soon be there himself, it may be that he should be deemed a guest from the time the property is taken in charge by the host. But when, as in *Mason v. Thompson*, the owner has never been at the inn, and never intends to go there as a guest, it seems to me little short of a downright absurdity to say, that in legal contemplation he is a guest. If our lawgivers had intended that the innkeeper should be answerable as such for every thing he received in charge, guest or no guest, they would have said so. They would not have taken the roundabout mode of saying that he must answer for the goods of the guest, and that every one is a guest who has goods in his hands. Now, in this case, Tyler, who owned the horse, never was the plaintiff's guest. Nor was he a traveller or transient person. He was the plaintiff's neighbor. In this respect the case differs from *Mason v. Thompson*, though I should feel no disposition to follow that decision, if this difference did not exist. I think the extraordinary liability of the innkeeper does not attach until he actually has

be liable for the loss of his luggage, or for money left by him in the hands of the innkeeper.<sup>1</sup>

§ 746. But if a person, not being a traveller, come upon a special contract, and stay, he is a boarder, and not a guest.<sup>2</sup>

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a guest, and without such liability the innkeeper, as such, has no lien on the goods." See, also, *Smith v. Dearlove*, 12 Jurist, 377; *Berkshire Woollen Co. v. Proctor*, 7 Cushing, R. 426; *Thickstun v. Howard*, 8 Blackf. R. 535; *Washburn v. Jones*, 14 Barb. R. 193.

<sup>1</sup> *McDaniels v. Robinson*, 26 Verm. R. 317. In this case Mr. Chief Justice Redfield says: "This case, on the evidence put in by the plaintiff, seems to present, in the first instance, the relation of guest, in the strictest sense. And we do not think it necessary, to continue that relation, that the plaintiff should have continued his dwelling, for the time even, within the inn. The relation of guest was clearly created by putting the horse at the inn, and it was undeniably extended to all the plaintiff's goods left at the inn by his taking a room, and taking some of his meals at the inn, and lodging there a portion of the time. This matter seems to be perfectly settled by the custom in the cities. It is there considered that taking a room is the decisive act to create the relation. That being done, the guest is charged, as such, for his meals and lodging, whether he take them at the inn or with his friends, as any one may know who has had experience in such matters. And this seems to us well enough. One, in so extensive a city as New York, might find it convenient to have a room for his parcels, and to take his dinner at a down town hotel, while he might choose to have his lodging, and most of his personal apparel and baggage at an up-town house. And it would certainly be unreasonable, if one chose to be at this expense that he should not have the same security for his goods left at the one hotel as the other. Or if one took lodgings at a hotel, and should subsequently find it more comfortable to lodge with a friend, and for any reason should not choose at once to give up his room, and break up his connection with the hotel, it would certainly sound very strange that he should not have the same security for his goods as if he made the hotel his constant abiding place for the time. He would certainly be bound, ordinarily, to pay till he gave up his room, and in all the books, pay, or the right to charge, is made the criterion of the innkeeper's liability. But after one has given up his room, and closed his connection with the hotel, then, indeed, it is generally understood, and no doubt correctly, that for any baggage left at the inn the landlord is only liable as a common bailee." See, also, *Hickman v. Thomas*, 16 Ala. R. 666; *Washburn v. Jones*, 14 Barbour, R. 193, and cases cited in the previous notes; *Wintermute v. Clarke*, 5 Sandf. R. 212.

<sup>2</sup> 2 Bac. Abr. Inns and Innkeepers, C. 5; Story on Bailm. § 477.

So, also, a neighbor, or friend, who comes at the request of the innkeeper, is not a guest. But if a traveller put up at an inn, and be there received as a guest, he does not cease to be a guest, and become a boarder, simply by making a special agreement with the innkeeper for the price of his board per week.<sup>1</sup>

§ 746 a. In respect to the specific lien of an innkeeper on all property brought by a guest to the inn, and placed expressly or impliedly in his charge, it does not ordinarily matter whether the guest be the lawful owner or be a wrongdoer, having no right whatever to it; for, as the innkeeper has no power to inquire into the right of property, he must rely on the possession

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<sup>1</sup> Berkshire Woollen Co. v. Proctor, 7 Cush. R. 417. In this case, the plaintiff's agent, named Russell, was robbed of money while at the defendant's inn. Fletcher, J. said, "It is further maintained for the defendants, that Russell was not a guest, in the sense of the law, but a boarder. But Russell surely came to the defendants' inn as a wayfaring man and a traveller, and the defendants received him as such wayfaring man and traveller, as a guest at their inn. Russell being thus received by the defendants, as their guest at their inn, the relation of innkeeper and guest, with all the rights and liabilities of that relation, was instantly established between them. The length of time that a man is at an inn, makes no difference, whether he stays a week or a month, or longer, so that always, though not strictly *transiens*, he retains his character as a traveller. Story on Bailm. § 477. The simple fact that Russell made an agreement as to the price to be paid by him by the week, would not, upon any principle of law or reason, take away his character as a traveller and a guest. A guest for a single night might make a special contract, as to the price to be paid for his lodging, and whether it were more or less than the usual price, it would not affect his character as a guest. The character of a guest does not depend upon the payment of any particular price, but upon other facts. If an inhabitant of a place makes a special contract with an innkeeper there, for board at his inn, he is a boarder, and not a traveller or a guest in the sense of the law. But Russell was a traveller, and put up at the defendants' inn as a guest, was received by the defendants as a guest, and was, in the sense of the law, and in every sense, a guest." See, also, as to meaning of guest, Washburn v. Jones, 14 Barbour, R. 193; McDonald v. Edgerton, 5 Barbour, R. 560; Towson v. Havre de Grace Bank, 6 Har. & Johns. R. 47.

as sufficient indication of ownership.<sup>1</sup> Besides, as Lord Chief Justice Holt says, in a case where a horse was put up at an inn : “ Supposing the traveller was a robber, and had stolen this horse ; yet, if he comes to an inn, and is a guest there, and delivers the horse to the innkeeper, (*who does not know it,*) the innkeeper is obliged to accept the horse ; and then it is very reasonable that he shall have a remedy for payment, which is by retainer. And he is not obliged to consider who is the owner of the horse, but whether he who brings him is his guest or not.”<sup>2</sup> But it would seem, both from this statement, as well as from subsequent cases, that the landlord would not have this right of lien, when he knows that his guest has wrongfully obtained possession of the property,<sup>3</sup> or when he knows that the property was lent to, or hired by, his guest.<sup>4</sup> And it has also been held, that where a person was stopped with a horse, under suspicious circumstances, and the horse was placed at the inn by the police, that the innkeeper had no lien on him for his keeping.<sup>5</sup> But, except in such cases, the innkeeper could retain the stolen property brought by his guest, against the real owner, until his charge thereon was paid.

§ 746 b. When a party of friends come to an inn to dine, they are jointly and severally liable for the entire cost of the entertainment, unless there be circumstances showing an express intention to the contrary ;<sup>6</sup>— as if they should come as

<sup>1</sup> *Yorke v. Grenaugh*, 2 Ld. Raym. R. 867 ; *Johnson v. Hill*, 3 Starkie, R. 172 ; *Binns v. Pigot*, 9 Car. & Payne, R. 208 ; *Angell on Carriers*, § 363, § 364 ; *Turrell v. Crawby*, 13 Jurist, 878 ; and *Law Reporter*, (Boston,) for Jan. 1850, p. 478 ; *Turrill v. Crowley*, 13 Q. B. Rep. 197.

<sup>2</sup> *Yorke v. Grenaugh*, 2 Ld. Raym. R. 867.

<sup>3</sup> *Johnson v. Hill*, 3 Starkie, R. 172.

<sup>4</sup> *Broadwood v. Granara*, 28 Eng. Law & Eq. R. 443, and Bennett’s note ; *Fox v. McGregor*, 11 Barbour, R. 41 ; *Binns v. Pigot*, 9 Car. & Payne, 208.

<sup>5</sup> *Binns v. Pigot*, 9 Car. & Payne, 208.

<sup>6</sup> *Forster v. Taylor*, 3 Camp. R. 39. Per Lord Kenyon.

guests of one person and be so understood by the landlord to be,— or if one person should specially order the dinner and assume sole responsibility therefor; in which cases, as credit would be solely given to one, no implied promise would be raised by the others to pay.<sup>1</sup>

§ 747. This class of bailees constitutes an exception to the general rule, applicable to bailees for custody. An innkeeper's responsibilities are nearly coincident with those of a common carrier.<sup>2</sup> He is bound to exert the greatest diligence in regard to the goods and chattels of his guests; and his responsibility extends to deeds, obligations, and *chooses in action*,<sup>3</sup> as well as to all the movable goods and money which are placed within the inn; and is not limited to such things and sums only as are designed and are necessary for the ordinary travelling expenses of the guest.<sup>4</sup> He is regarded as an insurer of all property committed to his care, and mere proof of a loss by a guest at the inn renders him *primâ facie* responsible.<sup>5</sup> He may, however, exonerate himself, by proving that the guest had undertaken the exclusive custody of the goods, or occasioned the loss by his own negligence;<sup>6</sup> or that the loss result-

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<sup>1</sup> Rolle's Abr. 24, 31.

<sup>2</sup> Kent *v.* Shuckard, 2 Barn. & Adolph. 803; Thompson *v.* Mason, 9 Pick. R. 283; Berkshire Woollen Co. *v.* Proctor, 7 Cushing, R. 417. In Dawson *v.* Chamney, 5 Adolph. & Ell. (n.s.) 164, it is held that the innkeeper may show that the loss was not occasioned by his own negligence or the negligence of his servants. Merritt *v.* Claghorn, 23 Verm. 177; Metcalf *v.* Hess, 14 Ill. 129. But see *contra*, Shaw *v.* Berry, 31 Maine, 478; Thickstun *v.* Howard, 8 Blackf. 535; Manning *v.* Wells, 9 Humph. 746; Mateer *v.* Brown, 1 California R. 221.

<sup>3</sup> Calye's Case, 8 Co. R. 32; Com. Dig. Action on the Case for Negligence, B. 1, 2; Grinnell *v.* Cook, 3 Hill, R. 486; Thompson *v.* Mason, 9 Pick. R. 280.

<sup>4</sup> Berkshire Woollen Co. *v.* Proctor, 7 Cushing, R. 417; Armistead *v.* White, 6 Eng. Law. & Eq. R. 349; Kent *v.* Shuckard, 2 Barn. & Adolph. 803.

<sup>5</sup> Ibid. Mason *v.* Thompson, 9 Pick. R. 283; Clute *v.* Wiggins, 14 Johns. R. 175; Piper *v.* Manny, 21 Wend. R. 282; Richmond *v.* Smith, 8 Barn. & Cres. 9; 2 Kent, Comm. Lect. 40, p. 594; Bennett *v.* Mellor, 5 T. R. 273; Jones *v.* Tyler, 3 Nev. & Man. 576; s. c. 1 Adolph. & Ell. 522.

<sup>6</sup> Armistead *v.* White, 6 Eng. Law & Eq. Rep. 349.

ed from inevitable casualty.<sup>1</sup> But for robbery and theft he would not seem to be responsible; <sup>2</sup> nor for a loss by fire happening without his negligence, or that of his servants.<sup>3</sup> Inn-

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<sup>1</sup> Calyc's Case, 8 Co. R. 32; Story on Bailm. § 482; 2 Kent, Comm. Lect. 40, p. 592, 593, 594; Burgess v. Clements, 4 M. & S. 306; s. c. 1 Stark. 251, n.; Farnworth v. Packwood, 1 Stark. 249; Sneider v. Geiss, 1 Yeates, 34; Richmond v. Smith, 8 B. & C. 9; Cohen v. Frost, 2 Duer, 341.

<sup>2</sup> Clute v. Wiggins, 14 Johns. R. 175; Kent v. Shuckard, 2 Barn. & Ad. 803; Richmond v. Smith, 8 Barn. & Cres. 9. But see Dawson v. Chamney, 5 Adolph & Ell. (N. S.) 164; 2 Kent, Comm. Lect. 40, p. 592; Berkshire Woolen Company v. Proctor, 7 Cush. R. 417. In this case £500 was stolen from the guest's room. "The responsibility of innkeepers," said Mr. Justice Fletcher, "for the safety of the goods and chattels and money of their guests, is founded on the great principle of public utility, and is not restricted to any particular or limited amount of goods or money. The law on this subject is very clearly and succinctly stated by Chancellor Kent, as follows:—'The responsibility of the innkeeper extends to all his servants and domestics and to all the movable goods and chattels and moneys of his guest, which are placed within the inn.' 2 Kent, Comm. 593. The liability of an innkeeper for the loss of the goods of his guest, being founded, both by the civil and common law, upon the principle of public utility, and the safety and security of the guest, there can be no distinction in this respect, between the goods and money. Kent v. Shuckard, 2 B. & Ad. R. 803; Armistead v. White, 6 Eng. Law & Eq. R. 349; Quinton v. Courtney, 1 Haywood, R. 40. The principle for which the defendants contend, that innkeepers are liable for such sums only, as are necessary and designed for the ordinary travelling expenses of the guest, is unsupported by authority, and wholly inconsistent with the principle upon which the liability of an innkeeper rests. The reasoning, both of the civil and common law, by which the doctrine of the liability of innkeepers, without proof of fraud or negligence, is maintained, is, that travellers are obliged to rely, almost entirely, on the good faith of innkeepers; that it would be almost impossible for them, in any given case, to make out proof of fraud or negligence in the landlord; and that, therefore, the public good and the safety of travellers require that innholders should be held responsible for the safe-keeping of the goods of the guests. This reasoning maintains the liability of the innkeeper for money of the guest, quite as strongly as his liability for goods and chattels, and it would be clearly inconsistent with the general principle upon which the liability is founded, to hold that the defendants were not responsible for the money lost in the present case." 2 Kent, Comm. 592 to 594; Story on Bailm. § 478, 481.

<sup>3</sup> Merritt v. Claghorn, 23 Verm. R. 177.

keepers are, however, subject to the liabilities of common carriers, only when they receive goods in the capacity of innkeepers, and not of mere bailees for hire.<sup>1</sup>

§ 748. Innkeepers are liable in like manner for the defaults and frauds of their servants and their guests;<sup>2</sup> but only for such losses as occur to the traveller while he is their guest.<sup>3</sup> So, also, innkeepers are ordinarily liable only for the goods which are brought within the inn, or the buildings appurtenant thereto.<sup>4</sup> But it is not necessary that the goods belonging to the guest should be put specially in the charge of the innkeeper; for if they be in his house, they are under his implied care, whether he be ignorant of such fact or not; and if they be stolen, he is responsible.<sup>5</sup> If, therefore, goods be stolen from the chamber of a guest, the innkeeper is liable, although he receive no notice that they were placed there.<sup>6</sup> So, also,

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<sup>1</sup> *Grinnell v. Cook*, 3 Hill, R. 487; *Story on Bailm.* § 487. Inns and taverns are, however, in many of the States of the United States, under statute regulations, which define their character. *N. Y. Rev. Statutes*, vol. 1, p. 661, 678, 682. See 6 *Purd. Dig.* 502; *Stat. of Ohio*, 1837; *Stat. of Connecticut*, 1838, p. 592, 595. In 2 *Kent, Comm. Lect.* 40, p. 596, note, the provisions of the statutes in many of the States in this country are briefly and clearly stated. *Story on Bailm.* § 485. See ante, 745.

<sup>2</sup> *Story on Bailm.* § 470; *Jones on Bailm.* § 94; *Comm. Dig. Action on the Case for Negligence*, B.; *Kent v. Shuckard*, 2 B. & Ad. 803; *Calye's case*, 8 Co. R. 32; 2 *Kent, Comm. Lect.* 40, p. 592, 593.

<sup>3</sup> *Towson v. Havre de Grace Bank*, 6 Harr. & Johns. R. 47.

<sup>4</sup> See *Albin v. Presby*, 8 N. Hamp. R. 408; *Simon v. Miller*, 7 Louis. Ann. R. 360.

<sup>5</sup> *Story on Bailm.* § 471; *Bennett v. Mellor*, 5 T. R. 276; *Calye's case*, 8 Co. R. 32; 1 *Black. Comm.* § 452; 2 *Kent, Comm. Lect.* 40, p. 593; *Quinton v. Courtney*, 1 Hayw. N. C. R. 40; *Clute v. Wiggins*, 14 Johns. 175; *Newson v. Axon*, 1 *McCord*, R. 509; *Piper v. Manny*, 21 Wend. 282; *Kent v. Shuckard*, 2 *Barn. & Adolph.* 803; *Richmond v. Smith*, 8 *Barn. & Cres.* 9; *Towson v. Havre de Grace Bank*, 6 Harr. & Johns. R. 47.

<sup>6</sup> *Kent v. Shuckard*, 2 B. & Ad. 803; 2 *Kent, Comm. Lect.* 40, p. 592; *Calye's case*, 8 Co. R. 32; *Bennett v. Mallor*, 5 T. R. 273; *Berkshire Woollen Co. v. Proctor*, 7 *Cush. R.* 417.

where money was stolen from the saddle-bags of a guest, it was held, that the innkeeper was responsible, although he was not informed that they contained money.<sup>1</sup> And, in another case, the innkeeper was held to be responsible for bags of grain stolen from the loaded sleigh of a guest, which had been placed in an outhouse appurtenant to the inn, with closed doors.<sup>2</sup>

§ 749. Whenever articles are put into the custody or under the care of the innkeeper or his servants, the innkeeper is liable in case of loss. And if an innkeeper put a horse belonging to his guest out to pasture, without his request, he will be responsible, if there be any injury or loss occasioned thereby. It would be otherwise, however, if the request of the guest be expressly or impliedly given.<sup>3</sup> So, also, if the traveller follow the direction of the innkeeper or his servant in the disposition of his goods, the same rule obtains. Thus, an innkeeper will be responsible for the safe-keeping of the goods of a traveller stopping at the inn for the night, if the carriage or wagon containing them be deposited in a place designated by the servant of the innkeeper, even although it should be an open space near the highway.<sup>4</sup> So, also, if the landlord be ordered to place the goods under the roof, and he omit to comply with the order, he is responsible. The same rule would apply, also, if the usage or custom of the place imposed upon him the duty of placing the goods in a particular place, or under roof, although no order be given by the guest, in relation thereto. Thus, where a traveller directed his horse to be put in the

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<sup>1</sup> Quinton *v.* Courtney, 1 Hayward, N. C. R. 40.

<sup>2</sup> Clute *v.* Wiggins, 14 Johns. R. 175; Piper *v.* Manny, 21 Wend. R. 282.

<sup>3</sup> Calye's case, 8 Co. R. 32; Story on Bailm. § 478, 479; Hawley *v.* Smith, 25 Wend. R. 612.

<sup>4</sup> Piper *v.* Manny, 21 Wend. R. 282; Hill *v.* Owen, 5 Black. (Ind.) R. 323; Richmond *v.* Smith, 8 Barn. & Cres. 9; Jones *v.* Tyler, 3 Nev. & Man. 576; s. c. 1 Adolph. & Ell. 522.

stable, and gave no direction about the gig, and the gig was left out, and stolen, the innkeeper was held liable, under an implied promise to take the gig into the stable.<sup>1</sup> But if the usage of the place be to leave carriages in an open shed or to leave the stable door unlocked, and the circumstances be such as to indicate the traveller's assent to such an arrangement, the innkeeper would not probably be held responsible in case they were stolen.<sup>2</sup> But if the traveller assume to take charge of his own goods, and leave them outside the inn,<sup>3</sup>—as if he leave his loaded wagon under an open shed near the highway, making no request of the innkeeper to take custody of it, and not being directed by him or his servants to leave it in such place,—the innkeeper would not be responsible, notwithstanding it be usual to stand loaded teams in the place.<sup>4</sup> So, also, if a traveller hire a room to deposit his goods in, and use it as a warehouse, having exclusive possession, and keeping the key, he assumes personal responsibility.<sup>5</sup> Again, if he place his goods in the exclusive keeping of another person than the innkeeper, the innkeeper is not responsible.<sup>6</sup> So, also, if an innkeeper request his guest to place his goods in a particular room, under lock and key, or he will not be responsible for them, and the guest neglect or refuse so to do, and leave them in an outer court, the innkeeper will be exonerated.<sup>7</sup> But a custom or usage at an inn for guests to leave their valuables at the bar, or in charge of the innkeeper or his servants, is not binding upon any guest, unless he has actual notice of it; and

<sup>1</sup> *Jones v. Tyler*, 3 Nev. & Man. R. 576; s. c. 1 Adolph. & Ell. 522.

<sup>2</sup> *Dansey v. Richardson*, 25 Eng. Law & Eq. R. 91; 2 Kent, Comm. Lect. 40, p. 592, 4th ed.; *Story on Bailm.* § 478.

<sup>3</sup> *Armistead v. White*, 6 Eng. Law & Eq. R. 349; *Calye's case*, 8 Co. R. 32.

<sup>4</sup> *Albin v. Presby*, 8 N. Hamp. R. 408; *Hawley v. Smith*, 25 Wend. R. 642; *Burgess v. Clements*, 4 Maule & Selw. R. 306; *Farnworth v. Packwood*, 1 Stark. R. 249. See, also, 2 Kent, Comm. Lect. xl. p. 592, 593.

<sup>5</sup> *Burgess v. Clements*, 4 Maule & Selw. R. 306; *Farnworth v. Packwood*, 1 Stark. R. 249.

<sup>6</sup> *Sneider v. Geiss*, 1 Yates, R. 34.

<sup>7</sup> *Story on Bailm.* § 479; *Calye's case*, 8 Co. R. 32.

in such case evidence of such custom at other inns, is inadmissible evidence;<sup>1</sup> and it has been held that even though it be the custom of travellers to leave their driving boxes in the commercial room, the traveller may be guilty of such gross negligence, in repeatedly opening his box and counting his money in the presence of many persons in the room, and then leaving it so insecurely fastened as to open without a key, that the innkeeper would not be liable for a theft of the money.<sup>2</sup> In general, the room assigned by the innkeeper to his guest is the proper place of deposit for his luggage.<sup>3</sup>

§ 749a. Again, an innkeeper may become liable for goods stolen before they come to the inn,—and if an innkeeper should advertise to convey his guests free of charge from a railroad station to his house, together with their baggage, and the baggage of a guest should be lost or stolen on the way from the station to the inn, through want of care in the driver, the innkeeper would be liable.<sup>4</sup>

#### LODGING-HOUSE KEEPERS.

§ 749 b. The keeper of a lodging or boarding-house is not an innkeeper, as we have already seen.<sup>5</sup> He is only liable in virtue of the special contract he makes with each lodger, and is not bound to furnish entertainment and lodging to any person who may come. One material distinction between the two is in respect to the care which they are respectively bound to take of the goods of the guest. The innkeeper, as we have seen, is bound to the utmost diligence. But the boarding-house keeper is only bound to exercise due and reasonable care of the goods, and is only liable where he has been guilty of negligence. By due and reasonable care is meant such care as a

<sup>1</sup> *Berkshire Woollen Co. v. Proctor*, 7 *Cush. R.* 417.

<sup>2</sup> *Armistead v. White*, 6 *Eng. Law & Eq. R.* 349.

<sup>3</sup> See *Simon v. Miller*, 7 *Louis. (Ann.) R.* 360.

<sup>4</sup> *Dickinson v. Winchester*, 4 *Cush. R.* 114.

<sup>5</sup> *Ante*, § 744.

prudent person would take with respect to his own goods. If, therefore, a lodging-house keeper should leave the door open at night, so as to enable a thief to enter and steal goods of his lodger in the hall, he would be responsible therefor.

§ 749 c. Whether in case goods are lost through negligence of his servants, he is bound in like manner, is doubtful. It is clear that he is bound to exercise prudence and care in the selection of his servants, and not to engage those who are habitually negligent, but whether he would be liable in case goods are lost through a single act of carelessness and even gross negligence of a servant who is generally careful and prudent, has given rise to much discussion and disagreement in a late important case before the Queen's Bench, in which the court were equally divided in opinion.<sup>1</sup> Lord Campbell and Mr. Justice Coleridge

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<sup>1</sup> *Dansey v. Richardson*, 25 Eng. Law & Eq. R. 76. In this case it appeared that the plaintiff was a guest in the defendant's boarding-house at a weekly payment, upon the terms of being provided with board, lodging, and attendance. The plaintiff being about to leave the house, sent one of the defendant's servants to buy some biscuits, and he left the front door ajar, and while he was absent on the errand, a thief entered the house and stole a box of the plaintiff's from the hall. Mr. Justice Earle, who presided at the trial, directed the jury, "that a boarding-house keeper was not bound to take more care of her house and the things in it than a prudent owner would take, and that the defendant was not liable if there was no negligence on her part in hiring and keeping the servant, and he left it to the jury to say whether, if the loss happened through the negligence of the servant in leaving the door ajar, there was any negligence on the part of the defendant in hiring and keeping the servant." The jury thereupon found a verdict for the defendant upon the plea of not guilty, and for the plaintiff on another issue. The case was afterwards reargued by desire of the court, and the judges declared their opinions *seriatim*. Mr. Justice Earle said: "I am of opinion that there was no misdirection. The observations were made with reference to the conflicting evidence of the two parties, and were adapted to the different suppositions arising upon that conflict. The main principle was, that the defendant's duty was performed if she took such care of the house and things in it as a prudent owner would take: this the plaintiff does not dispute. It seems to me to follow, that the direction first complained of is correct, it being an application of this principle. For the door might be left open in the manner alleged by a servant without any want of any degree of care on the mistress's part, seeing

held that a lodging-house keeper, is liable for losses resulting from the negligence of his servants in like manner as if they resulted from his own negligence, but Mr. Justice Earle and

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that the owner of a house cannot always be at the front door, and when he is absent the fact may occur, notwithstanding every precaution on his part to prevent it. And with respect to the second observation which is objected to, it was merely explanatory of the direction that there would be no liability for this act of negligence, but there might be liability if the evidence proved other grounds for charging the defendant. Now, if the direction as to how liability arose was right, the observation explanatory of it was right, and if it was not, the misdirection is established without reference to this observation. I, therefore, pass it without further notice, and proceed to the substantial question, which is, whether the keeper of a boarding-house will be liable to a boarder for the value of any goods stolen from the house, if the negligence of a servant towards the mistress, such as an omission to shut the door according to her order, has given a facility for theft, which question I answer in the negative, on the grounds that there is no precedent or principle establishing such a liability, and that there is no analogy between this case and either of the two classes of cases above mentioned. First, the absence of any precedent establishing such a liability is strong to show its non-existence, for, if it existed, the occasion for enforcing it must have often occurred. Boarding-houses have been numerous, and it is reasonable to suppose that thefts in them have occurred which were facilitated by the negligence of servants; also, if the keepers of boarding-houses would be liable on the ground here alleged, so also would be the letters of lodgings, the same reasoning applying equally to each; and yet no decision, or dictum, or treatise, has been found to sanction the notion of this supposed liability, or to give a principle on which it could rest. Secondly, there is no analogy between the present case, and either of the two classes of cases relied on for the plaintiff. In the class of cases relative to certain bailees for reward, who are liable for the loss of the goods if they are stolen through the negligence of their servants, the goods are delivered to, and are in the possession of the bailee, who by the contract of bailment for reward, undertakes a private duty to the bailor to keep them with care and to deliver them again; and this private duty is the test to ascertain whether any alleged state of facts amounts to actionable negligence; for the question, whether given facts amount to actionable negligence depends upon the legal duty owed to the party, who affirms the negligence to be a breach of the duty owing to him by the opposite party. But in the present case there is no delivery of the goods of the plaintiff to the defendant; there is no contract by the defendant to keep them with care, and deliver them again; there is no reward in respect of goods, the terms being the

Mr. Justice Wightman thought that he was only bound to take requisite care to employ none but trustworthy servants,

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same for a boarder whether with or without goods; there is no duty of keeping owing from the defendant to the plaintiff, and consequently no measure by which to try whether any given act, such as leaving a door open, is actionable negligence, contrary to that duty. The goods of the plaintiff in this case remained in her possession, and under her control, and were disposed of by her as she chose, without notifying what she had done, to the defendant. The bailee, for reward, has possession, and can apply care to guard, and undertakes to do so; the defendant had no possession and could apply no care to goods which she knew not of. The decision that a bailee by deposit is not liable for a theft by his own servants, unless there was negligence of himself, is in favor of the defendant, for she had not the same duty to keep with care as a depositary has, not having had the possession. In *Foster v. The Essex Bank*, cited from American Reports in *Story on Bailments*, 388, and *Finucane v. Small*, 1 Esp. 315, it appears that the servants of the depositary stole the deposit, and the masters were held not liable. Now, if a depositary is not liable for an actual theft by his servant, it seems to me that he ought not to be liable for a theft facilitated by the negligence of his servant. In the other class of cases relied on by the plaintiff, where the master is held liable for the act of the servant, the servant has, in the course of his employ, caused damage by a misfeasance in violating some public or private right of the complainant. The usual example of this species of liability is in cases of collisions on highways, there being a public right to the safe use of highways, and a correlative duty not to obstruct that use; and the master who by himself or his servant makes a wrongful collision, violates the public right, and is liable for the consequent damages: and though this doctrine has been said to apply when the servant is guilty of an omission only, and the damage arises from an act of a stranger, as where the cart was left by the servant, and a stranger struck the horse, which backed into the plaintiff's window. *Illidge v. Goodwin*, 5 Car. & Pres. 190. Still, the true ground of decision, as expressed by the judge there, is, that it is a misfeasance to place a horse and cart without attendance in a public street, and the damage was sufficiently connected with that misfeasance. Here, the defendant by her servant had been guilty of no misfeasance; the omission to shut the front door violated no public right of the plaintiff, and was in no sense an injury to her; thus the supposed analogy between the present case and the cases of misfeasance by servants fails from the difference of the acts complained of; it fails, also, in respect of the remoteness of the damage. In cases of collision the damage is immediate from the injury, but in the present case the thing complained of is the open door, which, by itself, was harmless, and the damage arose from the wilful

and that being done, he would not be liable for any single act of negligence on the part of a servant.

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trespass of a third who entered and stole; and therefore the supposed analogy between a mere omission to close a door, and direct damage to person or property from wrongful collision fails doubly. The unlimited extent of the liability for unknown goods, and the impossibility to guard against all negligence in every servant, and the unreasonableness of charging a party for the loss of goods which he never was intrusted to keep, are strong against now imposing for the first time such an uncompensated risk on the keepers of lodging-houses, and I know of no reason for imposing it. I therefore think the plaintiff's rule for a new trial should be discharged." With him Mr. Justice Wightman concurred.

Lord Campbell, on the other hand, said: "After having considered this case very deliberatively, I come to the conclusion, that the rule for a new trial ought to be made absolute. I think that the application for a nonsuit was properly refused, and that the defendant was not entitled to a verdict on the fourth plea, denying that the plaintiff was received into the boarding-house with the goods, on the terms mentioned in the declaration. The declaration neither alleges a bailment into the personal custody of the defendant, nor charges an absolute duty to keep safely. The defendant did receive the plaintiff with her goods, 'on the terms of providing her with rooms, furniture, meat, drink, servants, attendance, and other necessaries, and of taking due and reasonable care of her goods while they were in the said house and plaintiff remained such guest therein,' that is, such due and reasonable care as a boarding-house keeper ought to take of the goods of a guest. This by no means amounted to the care which an innkeeper is bound to take of the goods of a guest, or the care required of a bailee with whom goods are deposited to be safely kept and returned to the owner, although the duty, whatever the extent of it might be, was not undertaken gratuitously. The evidence adduced by the defendant was very strong to rebut the case of negligence made by the plaintiff, and even to show negligence on the part of the plaintiff as conducive to the loss; but I cannot bring myself to think that the three questions were properly left to the jury. First, 'whether the loss happened from the negligence of the servant in leaving the door open?' Secondly, 'If it did, whether there was any negligence in the defendant in hiring or keeping such a servant?' And, thirdly, 'whether there was negligence on the part of the plaintiff which conduced to the loss?' If the jury should think that there was no negligence in the servant in respect to leaving the door open, they were to find for the defendant; and this was quite proper: but, although there should be negligence in the servant in leaving the door open, however gross it might be, still the jury were to find for the defendant, unless there was negligence in the defendant in hiring and keeping such a servant.

"The third question was to arise only if the two first were answered favourably for the plaintiff. Now, if the loss arose from gross negligence in the servant, I cannot say that the defendant might not be liable, although she was not guilty of any negligence in hiring or keeping the servant. Low as the duty of a boarding-house keeper may be with respect to the care of the goods of a guest, compared to that of an innkeeper, I cannot go so far as to say, that in no case can he be liable for loss of goods by the negligence of a servant, although he was not guilty of any negligence in hiring or keeping the servant. I by no means say, that if the loss of the plaintiff's dressing-case arose from the servant having by mistake left the door ajar when he intended to shut it, the defendant must be liable for the loss; but I think there may be negligence in a servant in leaving the outer door of a boarding-house open, whereby the goods of a guest are stolen, which might render the master liable. I think there is a duty on his part, analogous to that incumbent on every prudent householder, to keep the outer door of the house shut at times when there is a danger that thieves may enter and steal the goods of the guest. If he employs servants to perform this duty, while they are performing it they are acting within the scope of their employment, and he is answerable for their negligence. He is not answerable for the consequences of a felony, or even a wilful trespass committed by them; but the general rule is, that the master is answerable for the negligence of his servants while engaged in offices which he employs them to do; and I am not aware how the keeper of a lodging-house should be an exception to the rule. He is by no means bound to the same strict care as an innkeeper; but within the scope of that which he ought to do, I apprehend that he is equally liable, whether he is to do it by himself or his servants. The doctrine, that inquiry is to be made, whether the master was guilty of negligence in hiring or keeping the servants is, I believe, quite new. The *scienter*, as to the character and habits of the servants, may become material where an attempt is made to throw upon him a liability for a loss by their felony or wilful trespass, to which *prima facie* he is not subject. With respect to *commodatum*, or 'lending gratis,' it is expressly laid down by Lord Holt, in *Coggs v. Barnard*, that the bailee is liable for the negligence of his servant, without any consideration of personal negligence in hiring or keeping him. Putting the case of a horse borrowed, he says: 'If the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse. 2 Lord Raym. R. 916.' There extraordinary care is required, and the bailee is liable for slight negligence. But Story makes the bailee liable for the negligence of his servant in the case of the hirer of a horse, who is only bound to take the same care of the animal that a prudent man would of his own. 'The hirer is not only liable for his own personal default and negligence, but for the default and negligence of his servants and domes-

ties about the thing hired. If, therefore, a hired horse is ridden by the servant of the hirer so immoderately that he is injured or killed thereby, the hirer is personally responsible. So, if the servant of the hirer carelessly and improperly leaves open the stable-door of the hirer, and the horse is stolen by thieves, the hirer is responsible therefor.' Story on Bailments, p. 400. The same distinguished jurist proceeds to show, that in cases where only ordinary care is required in the bailee, he is not liable for thefts by his servants, unless there be circumstances which impute to him personally a want of due diligence. 'Thus, where a trunk was deposited with an upholsterer for a reward, the contents of which were stolen by his servants, notwithstanding reasonable care in the custody of it by him, he was held not responsible for the loss. But if a watch is deposited with a watchmaker for repairs, and it is left in his shop in a less secure repository than that in which he keeps his own, and it is stolen by his servants, he will be responsible for the loss. So, if an agistor of cattle for reward leaves open the gates of his field, or allows the fences to be defective so that the cattle escape, he is liable for the loss.' Ibid. p. 407.

"I conceive, that in all the various sorts of bailment, when a question arises as to the liability of the bailee for the loss of the thing bailed, it is to be determined by the degree of care required from the bailee and the degree of negligence from which the loss arose; and that the question is not whether the negligence is imputed personally to the bailee or to his servants within the scope of their employment. In the present case, if Mrs. Richardson herself had gone out and left the door ajar, so that a thief had entered and stolen the plaintiff's goods deposited in the hall, it would not necessarily follow that she would have been liable for the loss: The jury would have had to say whether, under all the circumstances, this was a want of the ordinary care to be expected from a prudent housekeeper. At some hours of the day, and in certain situations, the outer door of a house may be left entirely open, without any negligence. Story, in treating of the extraordinary responsibility of an innkeeper, intimates an opinion, that where it is the usual custom to turn a horse out to pasture in the night, the innkeeper would not be liable for the loss of a horse so turned out and stolen; and he adds, 'In the country towns in America, it is very common to leave chaises and carriages under open sheds all night at inns, and also to leave the stable-doors open or unlocked. Under such circumstances, if a horse or chaise should be stolen, it would deserve consideration how far the innkeeper would be liable.' Ibid. § 478.

"The questions to be left to the jury in the present case, I think, were, whether the door was left open, and whether there was a want of ordinary care and diligence in so leaving it open, whereby the property was lost. The distinction taken between the negligence of the servant in leaving the door open and the negligence of the defendant in hiring or keeping the servant, it seems to me cannot be supported. Wherever a loss of the thing bailed arises from a want of the degree of care which, from the nature of the bail-

ment, ought to be exercised, I think it immaterial whether the negligence be imputable personally to the bailee or to the servants employed by him. It was very truly observed at the bar, that this was not the common case of *depositum*, and that the duty of the defendant was not that of a bailee to whom a chattel is personally delivered to be safely kept and returned for reward. But there was a duty incumbent upon the defendant as keeper of the boarding-house, with respect to the plaintiff's goods, when they were lawfully deposited in the hall, and even while they remained in the room appropriated to the plaintiff; and I think it was a breach of that duty, if, through the gross negligence of the defendant or her servant, the outer door was left open at a time when thieves might be expected to enter the house, and by means thereof the goods were stolen. The luggage of a passenger by railway, though never delivered to any servant of the company, and remaining in the personal keeping of the passenger during the journey, is nevertheless in point of law in the custody of the company, so as to render them liable for its loss by the negligence of their servants. See Great Northern Railway Co. v. Shepherd, 8 Exch. R. 30; s. c. 14 Eng. Law & Eq. R. 367. But in the present case, the jury were told to find for the defendant, although the loss arose from the negligence of the servant and although there was no negligence on the part of the plaintiff, if the defendant was not guilty of negligence in hiring or keeping the servant. This amounts to the doctrine that the boarding-house keeper cannot be liable for negligence of the servant, however gross, which causes the loss of the goods of the guest, if the master cannot be justly accused of negligence in hiring and employing that servant. To this doctrine I cannot accede. I by no means suppose that a boarding-house keeper is liable for a loss of the goods of the guest by theft, where there has been no negligence. Robbery is *vis major*, which, according to the better opinion, would excuse even an innkeeper, although not a common carrier. But the loss here is alleged to have arisen from the gross negligence of the servant, for which I think the boarding-house keeper may be liable, without proof of previous knowledge of any deficiency or evil habit in the servant.

"In the argument it was contended, that the defendant could not be liable for this negligence of the servant, as it resolved itself into mere non-feasance. But, without determining whether the imperfect shutting of the door is to be called non-feasance or misfeasance, I think the doctrine cannot be supported, that where there is a duty to be performed which is left to a servant, the master is not liable for the omission or non-feasance of the servant. We have already seen the liability of the master where, from the omission to shut a stable door, a steed is stolen; and many other instances might be given where the omission of a servant to do acts in pursuance of a duty for protecting the public against danger, would render the master liable for the consequences. Here, the duty was that the outer door of the house should be properly attended to; not that it should be kept constantly shut; and the simple fact of its being left for a time ajar, or wide open, would be no conclusive evidence

of negligence for which the defendant is liable. But the outer door might be left open under circumstances which might make it amount to gross negligence; and if this was the act of a servant, I cannot say that, to render the boarding-house keeper liable, it is necessary to prove that he knowingly kept a negligent servant. The only duty in this case arose out of the relation of boarding-house keeper and guest; but I think there might have been a breach of that duty under the circumstances alleged and proved without proof of personal misconduct on the part of the defendant. I, therefore, concur with my brother Coleridge, in thinking that the rule for a new trial should be made absolute. But as my brother Wightman and my brother Erle are of a contrary opinion, the rule will fail." In this view Mr. Justice Coleridge concurred in an elaborate opinion. He says: "It will be observed that I have not attempted to lay down any precise definition of the amount or kind of care which the defendant was bound to have taken of the plaintiff's goods, but let the rule be that she was only bound to take such as a prudent householder would take of his own, and less than this it can scarcely be; yet, if you understand and apply that rule in the sense in which my brother Erle applied it, it is obvious that it is consistent with the grossest negligence, even misfeasance, on the part of the servant; for a mistress who uses all ordinary care in the hiring and overlooking of her domestics, may yet have careless or wilful servants, or drunken ones, or she may, unfortunately, have a servant who is commonly sober, and yet who, upon one occasion being intoxicated, may occasion great loss or injury to the goods of the guests in the house. And this may happen in the performance of services for the mistress in her place, and for what the mistress is paid, and yet the mistress will not be answerable. If the rule, so understood, be applicable to the case of negligence or omission, I cannot see in reason why it is not equally applicable to misfeasance and commission; the same care may have been taken in the selection of servants guilty of the latter in the grossest degree, and of the former, and if that care be used, the master will have done all that, according to the rule, is required of him. But it seems to me the same answer applies in both; the guest is entitled to the due and reasonable care absolutely; he comes to the house, and pays his money for certain things to be rendered in return, among others, the care I speak of. To him it is indifferent whether the master renders them in person or by a servant; it is the master who engages for them; the guest does not stipulate for wholesome food if the master has a good and careful cook, or a dry bed, or clean room, if the housemaid is cleanly and careful, or punctuality in obedience to his orders, if the domestics are civil and careful: he stipulates for all this directly from the master, having no control himself over the servants, and having nothing to do with the master's judiciousness or care, or good fortune in selecting them. And the duty of the master must be measured by the same rule; he undertakes to the guest not merely to be careful in the choice of his servants, but absolutely to supply him with certain things, and to take due and reasonable care of his goods. When, indeed, we

speak of taking the same care of the guest's goods as a prudent owner would take of his own, we do not speak of a habit or character generally, but we apply it to the particular instance upon which the question arises in judgment. Occasional carelessness of conduct is consistent with general carefulness of character, though it is not commonly found with it; a man, therefore, may be a prudent owner, and yet not in every instance take good care of his own property. The only practical question, therefore, turns upon the quality of the individual act — has such care been shown in the particular instance as the party injured had a right to insist on? If it has not, he must be answerable who expressly or impliedly has undertaken, for a sufficient consideration, to show it. It may be said, that this may sometimes lead to bad consequences, and no doubt the liability of masters for the acts or omissions of their servants weighs heavily on them; but the hardship would be at least equal, if the master were not liable, and it would be attended with injustice too. If the master be morally innocent, so must the injured party be also, (for he cannot recover, if by his own misconduct or negligence he has contributed to the loss); and of two innocent persons, surely he should suffer through whom it is, by the employment of another, the mischief has been occasioned. I think, therefore, that the case should go down to a new trial." See, also, in respect to boarding keepers, *Parkhurst v. Foster*, 5 Mod. R. 427; 1 Salk. R. 387; *Bonner v. Welborn*, 7 Georgia R. 296.

## CHAPTER X.

COMMON CARRIERS.<sup>1</sup>

§ 750. In respect to that class of bailments, for hire, called *locatio mercium velendarum*, or the carriage of goods, there is no difference of obligation from that which attaches to other bailees for hire, unless in certain excepted cases, which we shall consider in order: 1st. Common carriers; 2d. Postmasters and mail contractors.

§ 751. A common carrier is a person whose public employment is the carriage of goods for hire; such as railway companies,<sup>2</sup> truckmen, wagoners, carters, porters, ferrymen,<sup>3</sup> barge-men, masters of vessels, and, in a word, all persons whose business it is to carry goods for a reward.<sup>4</sup> If they receive no pay therefore, they are merely gratuitous bailees.<sup>5</sup> It is not necessary, however, that the compensation should be a fixed sum, or known as a freight; it will be sufficient if a hire or

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<sup>1</sup> For a full and able exposition of the law relating to this class of bailees, the reader is referred to Mr. Angell's recent Treatise on Common Carriers, which has appeared since the second edition of the present treatise.

<sup>2</sup> Kimball *v.* Rutland & Burlington Railroad, 26 Verm. R. 247.

<sup>3</sup> See Willoughby *v.* Horridge, 16 Eng. Law. & Eq. R. 437; White *v.* Win-nisimmet Co. 7 Cush. R. 154; Smith *v.* Seward, 3 Barr. R. 342; Fisher *v.* Clisbee, 12 Ill. R. 344.

<sup>4</sup> Story on Bailm. § 496, and cases cited; Angell on Carriers, § 69, 70; Alexander *v.* Greene, 7 Hill, R. 544.

<sup>5</sup> Fay *v.* New World, 1 Calif. R. 348.

recompense in the nature of a *quantum meruit* be paid. But if the hire or recompense be bestowed as a mere gratuity or voluntary gift, and not as a debt, or legally recoverable consideration, the party receiving it is not responsible as a common carrier,<sup>1</sup> but only as mandatary or gratuitous bailee. A carrier by land and by water<sup>2</sup> has the same liabilities. A carrier of passengers is not considered as a common carrier; and he is not subject to a common carrier's liabilities, in respect to the persons whom he carries; although he is in respect of their baggage. His liabilities in regard to the persons of passengers will be hereafter considered. If the proprietors of coaches, omnibuses,<sup>3</sup> or steamboats, carry goods on hire, as well as passengers, they are liable as common carriers, in respect to such goods, if it be their public employment; and not otherwise.<sup>4</sup> So, also, a *forwarding merchant*, who defrays the expenses of transporting goods from place to place, without having any interest in the conveyances in which they are transported, or in the freight, is not a common carrier; but

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<sup>1</sup> *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story, R. 55. But see post, § 765 a, as to carriers of passengers, where the contrary doctrine is held.

<sup>2</sup> *Bac. Abr. Carriers*, A.; 2 Kent, Comm. Lect. 40, p. 600 to 602; 1 Bell, Comm. p. 467, 468, 475; *Ashton v. Heaven*, 2 Esp. R. 533; *White v. Boulton, Peake*, R. 81; *Christie v. Griggs*, 2 Camp. R. 79; *Hollister v. Nowlen* 19 Wend. R. 234; *Cole v. Goodwin*, 19 Wend. R. 251; *Powell v. Myers*, 26 Wend. R. 591; *Camden & Amboy Railroad & Transp. Co. v. Belknap*, 21 Wend. R. 354; *Pardee v. Drew*, 25 Wend. R. 459; *Stokes v. Saltonstall*, 13 Peters, R. 181; *Hall v. Connecticut Steamboat Co.* 13 Conn. R. 319; *Robinson v. Dunmore*, 2 B. & P. R. 417; *King v. Shepherd*, 3 Story, R. 356; *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, R. 17.

<sup>3</sup> *Dibble v. Brown*, 12 Georgia R. 217.

<sup>4</sup> *Lovett v. Hobbs*, 2 Show. R. 128; 1 Salk. R. 282; *Upshare v. Aidee*, 1 Comyns, R. 25; *Dwight v. Brewster*, 1 Pick. R. 50; *Allen v. Sewall*, 2 Wend. R. 327; s. c. 6 Wend. 335; *Story on Bailm.* § 500, 501; *Orange County Bank v. Brown*, 9 Wend. R. 85, 114; *Camden & Amboy R. B. Co. v. Burke*, 13 Wend. R. 611; *Hastings v. Pepper*, 11 Pick. R. 41; *Middleton v. Fowler*, 1 Salk. R. 282; *Sheldon v. Robinson*, 7 N. Hamp. R. 157; *Palmer v. Grand Junction Railway Co.* 4 Mees. & Welsb. R. 749; *Dwight v. Brewster*, 1 Pick. R. 50; *Fish v. Ross*, 2 Kelly, (Geo.) R. 349.

merely a warehouse-man.<sup>1</sup> Whether proprietors of steam-tugs or tow-boats, the regular business of which is to tow vessels in and out of port for hire, would have the responsibility of common carriers, does not seem to be distinctly settled, though the weight of opinion seems to incline to the doctrine that they have not.<sup>2</sup> So, also, owners of steamboats and ships en-

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<sup>1</sup> *Platts v. Hibbard*, 7 Cow. R. 497; 2 Kent, Comm. Lect. 40, p. 591; *Roberts v. Turner*, 12 Johns. R. 232; *Caton v. Rumney*, 13 Wend. R. 387; 2 Kent, Comm. Lect. 40, p. 598, 599; *Maybin v. South Carolina Railroad Co.* 8 Richardson, R. 240. But see *Teall v. Sears*, 9 Barbour, R. 317.

<sup>2</sup> Mr. Chancellor Kent includes them in this class of bailees. 2 Kent, Comm. Lect. 40, p. 590; but Mr. Justice Story, in his work on Bailments, (§ 496,) excludes them. In *Alexander v. Green*, 3 Hill, R. 9, the doctrine stated in the text was held. The court says, "The defendants carry on the business of towing boats laden with merchandise and produce, and are undoubtedly willing to engage for all persons who may desire their services. But I think they are not common carriers. They do not receive the property into their custody, nor do they exercise any control over it other than such as results from the towing of the boats in which it is laden. They neither employ the master and hands of the boats towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The goods or other property remain in the care and charge of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the defendants, it can hardly be pretended that they would be answerable; and yet carriers must answer for such loss. If the case of *Caton v. Rumney*, 13 Wend. R. 387, does not go the whole length of deciding this question, we entertain no doubt that the circuit judge was right in ruling that the defendants are not common carriers." See *Wells v. Steam Navigation Co.* 2 Comst. R. 207; *Leonard v. Hendrickson*, 18 Penn. St. R. 40; *Steam Nav. Co. v. Dandridge*, 8 Gill. & Johns. R. 248. But in *Vander-slice v. Towboat Superior*, (Dist. Court Pennsylvania,) 13 Law Rep. (Boston,) No. 8, (Dec. 1850,) p. 402, the court says, in commenting on this case: "I confess that, after reading that case over carefully, the reasoning of the court does not appear to me conclusive, and that I am much more impressed by the argument of the counsel for the unsuccessful party. It has been suggested, that such steam-tugs should, perhaps, hold a place between common carriers and ordinary bailees for the carriage of goods; not liable in general for loss by fire or by robbery, since the owner or his immediate agent has, to a certain extent, the continued supervision of his property, but to be otherwise held to the highest degree of accountability, since the vessels towed is,

gaged in carrying freight, if they have the control, employment, and management thereof, are common carriers; but mere ownership will not constitute a person a common carrier, if the owner do not also manage and employ the vessel himself for the purposes of carriage.<sup>1</sup>

752. *Wagoners* and *teamsters* who ply between different towns, and whose public and habitual employment is to carry goods from one to the other for hire, are common carriers.<sup>2</sup> But

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for the time under their control — quite as much so as the baggage of a passenger in a stage-coach.

“But, if they are not to form a distinct new category, I should be strongly inclined to the opinion that they must be treated as common carriers.

“Their occupation is essentially a public one; they hold themselves out to the world as ready to serve all who will employ them; and they have whatever of advantage any common carrier can derive from such a public announcement.

“They have the custody and direction of the vessel to be transported; it is generally fastened to the steamer in such a manner as not to be safely detached while the two are in motion, unless by the act of those on board the steamer; and if detached while on the way, the boat is without any power of providing for her safety. The hands on board the boat, moreover, receive their orders from the steamer’s captain; and, in fact, the two move on together under the sole impulse and guidance of the steamer.

“The vast interests which are daily confided to such steam-tugs, the hazards to which our internal commerce may be subjected by a want of the highest degree of skill and care on the part of those who command them, and the difficulty of drawing the line, in a court of justice, between the consequences of mismanagement and those of mere stress of weather, or, where these come together, as they often do, of assigning to each its appropriate share of influence; these considerations urge us very strongly to hold the steam-tug to the rigid accountability of a common carrier.” See, also, Adams *v.* The New Orleans Steamboat Co. 11 Louis. 46.

<sup>1</sup> Tuckerman *v.* Brown, 17 Barbour, R. 191; Peters *v.* Rylands, 20 Penn. St. R. 497; Jencks *v.* Colman, 2 Sumner, R. 221; Hall *v.* The Connecticut Steamboat Co. 13 Conn. R. 319; Campbell *v.* Perkins, 4 Selden, R. 430.

<sup>2</sup> 2 Kent, Comm. Lect. xl. p. 598, 599; Story on Bailm. § 496 and note; Gisbourne *v.* Hurst, 1 Salk. R. 249; Gordon *v.* Hutchinson, 1 Watts & Serg. 285; Hyde *v.* Trent & Mersey Nav. Co. 5 T. R. 389; Robertson *v.* Kennedy, 2

it has been said that if they only undertake to carry from one part to another of the same town or city, the termini not being fixed, the carriage, cart, or truck being let by the job, hour, or day, to proceed to any destination appointed by the hirer, they are not common carriers.<sup>1</sup> But this doctrine has not been approved; and the rule may now be considered as established in this country, that a wagoner, or teamster, or carman, is equally a common carrier, whether he ply from one town to another, or only from one place to another in the same town.<sup>2</sup> A hackney-coachman or cab-driver does not assume the liabilities of a common carrier as to passengers; nor would he seem to be a common carrier as to the baggage of the person whom he takes.<sup>3</sup> And "expressmen," or those who forward goods from place to place, in conveyances owned by others, have been said not to be common carriers, but only bailees for hire.<sup>4</sup>

§ 752 a. A common carrier is distinguished from a private carrier, who undertakes a special carriage of goods, in his

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Dana, (Kent.) 430; Campbell *v.* Morse, Harper, (So. Car.) R. 468; Powers *v.* Davenport, 7 Blackf. (Ind.) 497; Angell on Carriers, § 76.

<sup>1</sup> By Lord Abinger, Lyon *v.* Mells, 5 East, R. 439. See, also, Ross *v.* Hill, 15 Law Journal, § 182; Brind *v.* Dale, 8 Car. & Payne, 207.

<sup>2</sup> Mr. Justice Story, (Story on Bailm, § 496,) and Mr. Chancellor Kent, (2 Kent, Comm. Lect. xl. p. 598,) so lay down the rule. It is also sustained in Robertson *v.* Kennedy, 2 Dana, R. (Kent.) R. 430; Hyde *v.* Trent and Mersey Nav. Co. 5 T. R. 389; Gordon *v.* Hutchinson, 1 Watts & Serg. 285. See, also, Ingate *v.* Christie, 3 Car. & K. 61; Hellaby *v.* Weaver, 17 Law Times Rep. July 8, 1851; Robertson *v.* Kennedy, 2 Dana, R. 430.

<sup>3</sup> See Ross *v.* Hill, 2 Man. Gr. & Scott, 877, 891, where a cabman was considered as not being a common carrier of luggage. It is, however, difficult to distinguish between the contract of a driver of a stage-coach and of a hackney-coachman, as to passengers and luggage. Both carry passengers for hire, and the carriage of luggage is no more incidental to the main contract of the one than of the other. Yet a stage-coach driver is liable as a common carrier for the luggage of the passengers. See post, § 768; Angell on Carriers, § 77. See, also, Story on Bailm. § 498.

<sup>4</sup> Hiersfield *v.* Adams, 19 Barbour, 577.

rights, duties, and responsibilities. The distinction between a common carrier and a private or special carrier is, that the former holds himself out *in common*, that is, to all persons who choose to employ him, as ready to carry for hire,— while the latter agrees in some special case with some private individual to carry for hire. The test seems to exist in the question, whether the carrier can refuse to carry in the particular case. If his employment be such that he cannot refuse to carry, he is a common carrier. If he can refuse, he is a private carrier. A mere carriage for hire in a particular case, where it is out of the usual business of the carrier, is not sufficient to make him a *common carrier*,— unless, indeed, the person offering to carry hold himself out in the individual case as a person engaged publicly and commonly in the business of common carriage, and thereby deceive him who sends ; or unless he make a special agreement to assume the responsibilities of a common carrier in the particular case.<sup>1</sup>

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<sup>1</sup> This distinction is borne out by the statement of Mr. Justice Story (Story on Bailments, § 496,) who says, “To bring a person within the description of a common carrier, he must exercise it as a *public* employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation *pro hac vice*.” So, also, in Sheldon v. Robinson, 7 N. Hamp. 157, 163, this same doctrine, *totidem verbis*, is laid down. The court goes on to say, “The employment of a common carrier is attended with peculiar responsibilities. He is bound to take all goods offered, if he has the requisite convenience to carry; and a refusal, without some just ground, subjects him to an action.” In this case a package of money was lost, which had been sent by a stage-coach driver, who it appeared had been in the habit of carrying packages for the convenience of persons who employed him, and receiving payment therefor, but who had never held himself out as a common carrier, agreeing to carry whatever packages of this kind should be presented. “The evidence does not show,” says the court, “the defendant a common carrier. It does not show him to have exercised the business of carrying packages as a public employment, because his public employment was that of a driver of a stage-coach, in the employ of others. It does not show that he ever undertook to carry goods or money for persons generally, although he may in fact have taken all that was offered, as a matter of convenience; or that he ever held himself out as ready to engage in the transportation of

§ 752 b. A private carrier incurs only the responsibility of an ordinary bailee for hire, namely, of ordinary diligence.<sup>1</sup>

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whatever was requested, notwithstanding it may have been unusual for him and other drivers to carry it. This was not his general employment, and there is nothing to show that he would have been liable had he refused to take this money — especially as he was in the service of another, and as such servant might have had duties to perform inconsistent with the duty of a common carrier.” The defendant, was, therefore, held to be “a bailee to carry for hire, and responsible for ordinary negligence.” So, also, in *Dwight v. Brewster*, 1 Pick. R. 50, the jury were instructed that “the practice, if proved, of carrying small packages, letters, &c. containing money, whenever applied to, for hire, constituted the defendant a common carrier.” This ruling was supported by the court, on a subsequent hearing, and they say, “a common carrier is one who undertakes, for hire or reward, to transport the goods of *such as choose to employ him*, from place to place.” In *The Citizens Bank v. The Nantucket Steamboat Co.* 2 Story, R. 17, the court proceed upon the same doctrine, confining the liability as common carrier to cases where there has been a public undertaking for hire. See *Gisbourne v. Hurst*, 1 Salk. R. 249; *Satterlee v. Groot*, 1 Wend. R. 272; *Upston v. Slark*, 2 Carr. & Payne, 598; *Gilbart v. Dale*, 1 Nev. & Per. 22; *Anonymous v. Jackson*, 1 Hayw. (N. Car.) R. 14; *Vanderslice v. Steam Towboat Superior*, (District Court of U. S. for Pennsylvania,) 13 Law Reporter, 402 (Boston,) Dec. 1850, Vol. III. No. 8, New Series; *Jenkins v. Pickett*, 9 Yerg. (Tenn.) R. 480. A different doctrine has, however, been declared in Pennsylvania, in *Gordon v. Hutchinson*, 1 Watts & Serg. R. 285, where it was held that “a wagoner who carries goods for hire, is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment.” Mr. Chief Justice Gibson, in the judgment of the court, says: “The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He applied for the transportation of these goods as a matter of business, and consequently on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him — there was nothing special in the case; on the contrary, the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility. There was evidence of negligence before the jury; but, independent of that, we are of opinion that he is liable as an insurer.” And again, in commenting on the case of *Gisbourne v. Hurst*, he says, “It is true the court went no further than to say the wagoner was a common carrier as to the privilege of exemption from distress; but his contract was held not to be a private undertaking, as the court was at first inclined to consider it, but a public engagement, by rea-

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<sup>1</sup> *Citizens' Bank v. The Nantucket Steamboat Co.* 2 Story, R. 33.

But a common carrier assumes the responsibility of an insurer; and is liable for all losses, except such as happen from

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son of his readiness to carry for any one who would employ him, without regard to his other avocations; and he would consequently not only be entitled to the privileges, but be subject to the responsibilities of a common carrier; indeed, they are correlative, and there is no reason why he should enjoy the one without being burdened with the other." See, also, to the same effect, *Turney v. Wilson*, 7 Yerg. (Tenn.) R. 340; *Craig v. Childress, Peck*, (Tenn.) R. 270; *M'Clures v. Hammond*, 1 Bay, (S. C.) R. 99. In *Moses v. Norris*, 4 New Hamp. R. 305, the facts are not fully enough stated to determine the value of the decision. It is certain, however, that the court assume the question which here occupies us; for it says, "In the first place, it is not mentioned whether the defendant was a carrier for hire or not; we are, however, inclined to think that it must be presumed, from the facts stated, that he was a carrier for hire." The words carriers and common carriers are, throughout the opinion, used as synonymous terms. If the doctrine stated by Mr. Chief Justice Gibson be correct, there seems to be but very slight difference, if there be any, between a private carrier and a common carrier. If the distinction be, that where a person offers to another to carry goods, he is a common carrier, when, if he is requested by the other party to carry them, he is not, it is difficult to perceive a sound reason for it. The contract would apparently be the same in each case, unless the party sending were actually misled, which would constitute a ground of deceit or mistake, where the innocent party ought not, on general principles, to suffer. See *Fish v. Ross*, 2 Kelley, (Geo.) R. 349, in which the case of *Gordon v. Hutchinson* is stated to be "opposed to the rules of the common law, and wholly inexpedient." The doctrines on the point in question are so clearly and ably stated, that I gladly avail myself of a portion of the judgment. Mr. Justice Nisbet says, in delivering the judgment of the court, "The court below decided that the plaintiff in error, under his contract with Chapman & Ross, was a *common carrier*, to which opinion he excepts. The evidence upon this point is the contract and nothing more. It does not appear that carrying was his habitual business; all that does appear from the record is, that he undertook upon a special contract, and upon this occasion, to haul on his own wagon, for a compensation specified, the goods of the defendants from the then terminus of the Central Railroad to the city of Macon. Does such an undertaking make him a *common carrier*? That is the question, and we are inclined to answer it in the negative. A *common carrier* is one who undertakes to transport from place to place for hire, the goods of such persons as think fit to employ him. Such is a proprietor of wagons, barges, lighters, merchant ships, or other instruments for the public conveyance of goods. See Mr. Smith's able commentary on the case of *Coggs v. Bernard*, 1 Smith, Leading Cases, 172; *Forward v. Pittard*, 1 T. R. 27; *Morse v. Slue*, 2 Lev. 69; 1 Vent.

inevitable accident, without the intervention of man; or from public enemies; or, as it is usually phrased, from the act of

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190, 238; *Rich v. Kneeland*, Cro. Jac. R. 330; *Maving v. Todd*, 1 Stark. R. 72; *Brooke v. Pickwick*, 4 Bing. R. 218. Railway companies are common carriers. *Palmer v. Grand Junction Canal Co.* 4 M. & W. R. 749." After quoting the section above cited (§ 495) from Mr. Justice Story's work on Bailments, and a passage from Mr. Chancellor Kent's Commentaries, (2 vol. p. 598,) to the same effect, he continues: "A *common carrier* is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey, or is not in the habit of conveying. *Jackson v. Rogers*, 2 Show. R. 327; *Riley v. Horne*, 5 Bing. R. 217; *Lane v. Cotton*, 1 Ld. Raym. R. 646; *Edwards v. Sherratt*, 1 East, R. 604; *Batson v. Donovan*, 4 B. & Ald. R. 32; 2 Kent, 598; *Elseec v. Gatwood*, 5 T. R. 143; 1 Pick. R. 50; 2 Sumner, R. 221; Story on Bailm. 322, 323; *Dudley*, S. C. Law and Eq. R. 159.

" It will be seen hereafter we hold that, according to the common law as of force in this country in 1776, a *common carrier* cannot vary or limit his liability by notice or special acceptance, and shall advert to this subject again. For the present we state the proposition broadly, that he is in the nature of an insurer of the goods intrusted to his care, and is responsible for every injury sustained by them, occasioned by any means whatever, except only the *act of God and the king's enemies*. 1 Inst. 89; *Dale v. Hall*, 1 Wils. 281; *Covington v. Willan*, Gow, 115; *Davis v. Garrett*, 6 Bing. 716; 2 Kent, 597; *Coggs v. Bernard*, 2 Ld. Raym. 918; 1 T. R. 27; 3 Esp. R. 127; 5 Bing. R. 217.

" It is from these definitions and from the two propositions stated, that we are to determine what constitutes a person a common carrier. I infer, then, that the business of carrying must be *habitual* and not *casual*. An occasional undertaking to carry goods will not make a person a common carrier; if it did, then it is hard to determine who, in a planting and commercial community like ours, is not one; there are few planters in our own State owning a wagon and team, who do not occasionally contract to carry goods. It would be contrary to reason, and excessively burdensome, nay, enormously oppressive, to subject a man to the responsibilities of a common carrier, who might once a year or oftener, at long intervals, contract to haul goods from one point in the State to another. Such a rule would be exceedingly inconvenient to the whole community, for, if established, it might become difficult in certain districts of our State to procure transportation.

" The undertaking must be general and for *all people indifferently*. The undertaking may be evidenced by the carrier's own notice, or practically by

God, or the king's enemies.<sup>1</sup> Whatever, therefore, may be the degree of active diligence and prudence exercised by the

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a series of acts, by his known habitual continuance in this line of business. He must thus assume to be the servant of the public; he must undertake for *all people*. A *special* undertaking for *one man* does not make a wagoner, or anybody else, a common carrier. I am very well aware of the importance of holding wagoners in this country to a rigid accountability; they are from necessity greatly trusted, valuable interests are committed to them, and they are not always of the most careful, sober, and responsible class of our citizens. Still the necessity of an inflexible adherence to general rules we cannot and wish not to escape from. To guard this point, therefore, we say, that he who follows wagoning for a livelihood, or he who gives out to the world in any intelligible way that he will take goods or other things for transportation from place to place, whether for a year, a season, or less time, is a *common carrier* and subject to all his liabilities.

" One of the obligations of a common carrier, as we have seen, is to carry the goods of any person offering to pay his hire; with certain specific limitations this is the rule. If he refuse to carry, he is liable to be sued, and to respond in damages to the person aggrieved, and this is perhaps the safest test of his character. By this test, was Mr. Fish a common carrier? There is no evidence to make him one—but his contract with Chapman & Ross. Suppose that, after executing this contract, another application had been made to him to carry goods, which he refused, could he be made liable in damages for such refusal upon this evidence? Clearly not. There is not a case in the books, but one to which I shall presently advert, which would make him liable upon proof of a single carrying operation.

" The extent of his liability, and his inability to vary that liability by notice or special acceptance, is another test. A common carrier is liable at all events, but for the act of God and the king's enemies; and he cannot limit or vary that liability. Whereas a carrier for hire in a particular case, is only answerable for ordinary neglect, unless he by express contract assumes the

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<sup>1</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909; *Story on Bailm.* § 511; *Jones on Bailm.* 103 to 107; *Id.* 122; *Co. Litt.* 89; *Forward v. Pittard*, 1 T. R. 33; *Abbott on Shipp.* P. 3, ch. 4, § 1, 5th edit.; *Williams v. Grant*, 1 Conn. R. 487; *The Maria & Vrow Johanna*, 4 Rob. R. 348; *Riley v. Horne*, 5 Bing. R. 217; *Dusar v. Murgatroyd*, 1 Washington, C. C. R. 17; *Thorogood v. Marsh*, 1 Gow R. 105; *Mershon v. Hobensack*, 2 Zabriskie, R. 372; *Friend v. Woods*, 6 Gratt. R. 189; *Chevallier v. Straham*, 2 Texas, R. 115; *Chase v. Washington Ins. Co.* 12 Barbour, R. 595; *Steele v. Insurance Co.*, 17 Penn. St. R. 290.

carrier and his servants, the carrier will be responsible, if there be human agency connected with the cause of the loss.

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risk of a common carrier; his liability may be regulated by his contract. We do not think this undertaking would give to Mr. Fish that character which would preclude him from defining his liability in any other contract. By this contract he may be liable *pro hac vice* as a common carrier, for *that* is a different thing.

" Upon these views we predicate the opinion, that the plaintiff in error was not a common carrier. From the way in which the opinion of the court is expressed in the bill of exceptions, I am left somewhat in doubt whether the able judge presiding in this cause, intended to say that the plaintiff in error was a common carrier, or that under his contract he was liable as such. If the former, we think he erred; and if the latter, as we shall more fully show, we think with him. In either event we shall not send the case back; for if he meant to say that the plaintiff upon general principles was a common carrier, thinking as we do that he is liable under this contract as such, he will not be benefited by the case's going back.

" In conflict with these views, it has been held in Pennsylvania, that 'a wagoner who carries goods for hire is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment.' Gibson, Chief Justice, in Gordon v. Hutchinson, 1 Watts & Serg. R. 285. This decision no doubt contemplates an undertaking to carry generally, without a special contract, and does not deny to the undertaker the right to define his liability. There are cases in Tennessee and New Hampshire which favor the Pennsylvania rule, but there can be but little doubt that that case is opposed to the principles of the common law, and its rule wholly inexpedient. See Story on Bailm. § 457, 495; Bac. Abr. Carrier, A.; 2 Bos. & Pul. R. 417; 4 Taunt. 787; Jones, Bailm. 121; 1 Wend. R. 272; 6 Taunt. R. 577; 2 Kent, 597.

" Assuming, then, that Mr. Fish was not a common carrier, what is he? This is a bailment for hire, '*locatio operis mercium vehendarum*'; the fifth in the learned classification of bailments, made by Holt, C. J., in Coggs v. Bernard. Mr. Fish is a private person contracting to carry for hire. The next question is, what are his liabilities? And this brings us to the main point of error charged upon the court below, and that is, that it erred in ruling that according to his contract the plaintiff in error was liable as a common carrier. In all cases of carrying for hire by a private person, we state that he is bound to ordinary diligence and a reasonable exercise of skill, and is not responsible for any losses not occasioned by ordinary negligence, unless he has expressly by the terms of his contract taken upon himself such risk. Story on Bailm. § 457; 2 Ld. Raym. 909, 917, 918; 4 Taunt. R. 787; 6 Taunt. R. 577; 2 Marsh.

This responsibility is affixed to common carriers, upon grounds of public policy,<sup>1</sup> and in consideration of the numerous opportunities afforded to them, by the nature of their business, for fraudulent combination, and clandestine dealings, to the injury of their employers. The law regards them, therefore, with that distrust which has been called "the sinew of wisdom."

§ 752 c. A common carrier is responsible for all losses except such as arise from the "act of God" or the "king's enemies." It becomes, therefore, necessary to inquire into the meaning of these two phrases. A loss by the act of God, in its legal sense, is understood to be any loss directly occasioned by a violent and irresistible natural occurrence, wholly unconnected with human agency, and which could not have been avoided by the exercise of the greatest prudence.<sup>2</sup> Thus, if a fire be occasioned by lightning, and the goods be destroyed thereby, the carrier is not responsible.<sup>3</sup> But if the fire occur through the negligence or fault of man, or be merely accidental, every possible precaution having been used to prevent it, he would be liable.<sup>4</sup> But losses arising simply from natural causes, however violent, would not, if they might have been avoided, be losses by the "act of God." Thus, where a steam-boiler

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R. 293; Jones on Balm. 103, 106, 121; 1 Bell, Comm. 461, 463, 467; 2 Bos. & Pul. R. 416; 8 Car. & Payne, R. 207; 2 Kent, 597."

<sup>1</sup> See Thurman *v.* Wells, 18 Barbour, R. 500.

<sup>2</sup> McArthur & Hurlbert *v.* Sears, 21 Wend. R. 190; Backhouse *v.* Sneed, 1 Murphy, R. 173; 1 Smith, Leading Cases, (Am. ed.); Mr. Wallace's note to Coggs *v.* Bernard, p. 231, 232; Colt .. McMechen, 6 Johns. R. 160. See Fish *v.* Chapman, 2 Geo. R. 349; Walpole *v.* Bridges, 5 Blackf. R. 222.

<sup>3</sup> Forward *v.* Pittard, 1 T. R. 27; Hyde *v.* Trent Nav. Co. 5 T. R. 399.

<sup>4</sup> Ibid. See, also, Hyde *v.* Trent & Mersey Nav. Co. 5 T. R. 389; Steam-boat Co. *v.* Bason, Harper, (So. Car.) R. 264; Gilmore *v.* Carman, 1 Smedes & Marsh. (Miss.) R. 279; Hale *v.* New Jersey Steam Nav. Co. 15 Conn. R. 539; New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 Howard, (Sup. Ct. U. S.) R. 344; Parker *v.* Flagg, 26 Maine R. 181; Parsons *v.* Monteith, 13 Barb. R. 353; Chevallier *v.* Straham, 2 Texas R. 115; Morewood *v.* Pollok, 18 Eng. Law & Eq. R. 341; Graff *v.* Bloomer, 9 Barr, R. 114; Swindler *v.* Hilliard, 2 Richardson, R. 286; Singleton *v.* Hilliard, 1 Strob. R. 203.

was cracked by the *frost*, and the steam issued so as to injure the cargo, it was held, that the carrier was responsible, because, by proper care in filling up the boiler over night, he might have prevented the accident;<sup>1</sup> and, therefore, that the loss arose

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<sup>1</sup> *Siordet v. Hall*, 4 Bing. R. 607. See, also, *Campbell v. Morse, Harper, (So. Car.)* R. 468; *Richards v. Gilbert*, 5 Day, (Conn.) R. 415. In *McCall v. Brock*, 5 Strob. R. 119, Frost, J., said: "The plaintiff's cotton was burnt together with the boat. Fire is not an excepted peril. A loss by fire, which, occurring in another boat, renders a carrier liable, will render him equally liable if he carries in a steamboat. But it is argued that though fire, originating from other causes, may not excuse the carrier, yet if it proceeds from the bursting of the boiler, it should be referred to the act of God, or inevitable accident. The well-settled legal import of these phrases, limits inevitable accidents to such as may be produced by physical causes, which are irresistible, which human foresight and prudence cannot anticipate, nor human skill and diligence avert. The boiler of a steam-engine is an implement of mechanical power, in common use. The ingenuity, which applied steam to the purposes of manufactures and navigation, provided also the means for its employment with safety. Terrific accidents are the inevitable and too frequent consequence of inattention to those means, or of wilful and rash counteraction of one or more of them. A boiler may be burst by the production of a pressure of steam greater than it was constructed to resist, or greater than, in its actual condition and state of repair, it may be capable of resisting. Certain fixtures are provided for the escape of any dangerous excess of steam, and other fixtures are provided to regulate its production and give warning of a deficiency of water in the boiler, which is the most frequent cause of disaster. Intelligent witnesses have testified, that the safeguards are sufficient to prevent an explosion, if properly attended to. A loss, then, which results from an excess of steam must be attributed to misconduct or negligence. An explosion may also occur if the boiler be defective in its construction, or if its strength be impaired by use, so that it cannot resist the pressure of steam, which, in its careful and prudent employment, may be necessary for the power it is required to exert. The carrier is bound to provide a safe boiler and keep it in good repair, and supply its place by a new one when its strength is impaired by use; and he is also bound to employ servants and mechanics who shall possess the necessary vigilance and skill to observe the condition of the boiler, at all times, and form a correct opinion of its strength and safety. An explosion can only happen from excess of steam, or the insufficiency of the boiler, and, therefore, may be prevented by proper diligence and skill. It does not weaken this conclusion, that, frequent as these disasters are, they are always represented to be unaccountable; that is, they are not accounted for."

partly from human agency. The same rule applies to a loss by collision at sea, no fault being attributable to either party.<sup>1</sup> So, also, if a barge-master should rashly attempt to shoot a bridge, during a violent storm, and his boat should be driven against one of the piers and destroyed, he would be liable, on account of his rashness.<sup>2</sup> But the freezing up of a river or

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But that is readily explained. The cause of the accident is left in obscurity, either by the destruction of the only witnesses who might explain it, or by testimony which negatives every possible cause for its occurrence. The persons, who alone can know, and who are responsible for what caused it, cannot have the hardihood to confess negligence or misconduct, which must expose them to criminal liabilities, and the more dreaded imprecations of bereaved relatives and friends, and of the whole community, shocked by the tragical consequences of an explosion.

"But if it be admitted that, in any case, the bursting of a boiler has proceeded from causes beyond human skill and vigilance, still the loss cannot be referred to the act of God. The steam-engine is of human invention, construction, and employment. Whoever uses this mechanical power must be responsible for its safety. If it be perilous, the more imperative must be such obligation. The carrier by steam power is, like any other carrier, liable for a loss which may arise from spontaneous combustion, or which may be extended to his vessel from the shore, when it may be impossible to remove the vessel from danger. These are losses apparently beyond prevention, at least as much as any possible accident to a boiler. Yet for them the carrier is liable; because, though the peril, when encountered, could not be resisted, it may possibly have been foreseen and avoided. Fire is a risk incident to a carrier's employment. No distinction can be made in regard to the causes from which the fire may originate. If such distinction were admitted, it could, with less reason, be applied in favor of the carrier for losses occurring by the propelling power of the boat, than for other losses by fire, more certainly beyond his power to prevent. It is not unjust nor harsh that he should be liable for losses, incident to the means of transportation he employs, on the same principle and to the same extent as other carriers, using a different motive power. If a vessel founders at sea, without stress of weather, the presumption is that it was not sea-worthy; and if the causes of an explosion are left in obscurity, the presumption must be, that the boiler was insufficient, or that it was exploded through misconduct or negligence."

<sup>1</sup> *Plaisted v. B. & K. Steamboat Co.* 27 Maine R. 132; *Mershon v. Hobensack*, 2 New Jersey R. 372.

<sup>2</sup> *Story on Bailm.* § 492; *Amies v. Stevens*, 1 Str. R. 128. See *Clark v. Barnwell*, 12 Howard, U. S. R. 272.

canal would be deemed to be "an act of God," so as to relieve the carrier of his responsibility for losses occasioned thereby, unless he were guilty of negligence, or of proper forecast.<sup>1</sup> Striking on an unknown snag in the usual channel of a river has sometimes been considered as "an act of God" so as to excuse the carrier;<sup>2</sup> but this construction has not met with entire approbation.<sup>3</sup>

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<sup>1</sup> Story on Bailm. § 492; Richards *v.* Gilbert, 5 Day, (Conn.) R. 415; An-gell on Carriers, § 160; Lowe *v.* Moss, 12 Ill. R. 477.

<sup>2</sup> Smyrl *v.* Nilon, 2 Bailey, R. 421; Williams *v.* Grant, 1 Conn. R. 487; Faulkner *v.* Wright, Rice, R. 107.

<sup>3</sup> Friend *v.* Woods, 6 Gratt. R. 189. In this case Daniel, J., said: "Among the strongest authorities cited in behalf of the plaintiffs in error, are the cases of Smyrl *v.* Nilon, 2 Bailey, R. 421; and Williams *v.* Grant, 1 Conn. R. 487. In the former it was held, that a loss occasioned by a boat's running on an un-known 'snag' in the usual channel of the river, is referable to the act of God, and that the carrier will be excused; and in the latter it was said, that striking upon a rock in the sea, not generally known to navigators, and actually not known to the master of the ship, is the act of God. And other autho-rities go so far as to assert, that if an obstruction be secretly sunk in the stream, and not being known to the carrier, his boat founder, he would be excused. The last proposition stands condemned by the leading cases, both English and American. In the case of Forward *v.* Pittard, 1 T. R. 27, Lord Mansfield says, that 'to prevent litigation, collusion, and the necessity of going into cir-cumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such an accident as could not happen by the intervention of man, as storms, lightning, and tempests.' The same doctrine is strongly stated in M'Arthur *v.* Sears, 21 Wend. R. 196, where it is said, that 'no matter what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled, or the force by which it is overcome, be inevitable; yet if it be the result of human means, the carrier is responsible.'

"These cases clearly restrict the excuse of the carrier for losses occasioned by obstructions in the stream, to such obstructions as are wholly the result of natural causes. And the cases in which the carriers have been exonerated from losses occasioned by such obstructions, as Smyrl *v.* Nilon, and Williams *v.* Grant, before mentioned, will, I think, upon examination, be found to be cases in which either the bills of lading contained the exception 'of the perils of the river, or in which that exception has been confounded with the excep-tion of the 'act of God.' In the case of M'Arthur *v.* Sears, a distinction be-

§ 752 d. In the next place, as to the meaning of the phrase "the king's enemies," "enemies of the State," or "public

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tween the two phrases is pointed out. It is shown that the exception 'of dangers or perils of the sea or river,' often contained in bills of lading, are of much broader compass than the words, 'act of God;' and the case of *Gordon v. Buchanan*, 5 Yerg. R. 71, is cited with approbation, in which it is said, that 'many of the disasters which would not come within the definition of the act of God, would fall within the former exception; such, for instance, as losses occasioned by hidden obstructions in the river newly placed there, and of a character that human skill and foresight could not have discovered and avoided.'

"In a note to the case of *Coggs v. Barnard*, in the American edition of Smith's Leading Cases, 43 Law Lib. 180, the American decisions are collated and reviewed, and a definition is given to the expression 'act of God,' which expresses, I think, with precision, its true meaning. The true notion of the exception is there held to be, 'those losses that are occasioned exclusively by the *violence of nature*; by that kind of force of the elements which human ability could not have foreseen or prevented; such as lightning, tornadoes, sudden squalls of wind.' 'The principle that all human agency is to be excluded from creating or entering into the cause of mischief, in order that it may be deemed the act of God, shuts out those cases where the natural object in question is made a cause of mischief, solely by the act of the captain in bringing his vessel into that particular position where alone that natural object could cause mischief; rocks, shoals, currents, &c., are not, by their own nature and inherently, agents of mischief and causes of danger, as tempests, lightning, &c., are.'

"The act of God which excuses the carrier must, therefore, I think, be a direct and violent act of nature. The rule, it is insisted, is a harsh one upon the carrier, and it is argued that the court should be slow to extend it further than it is fully sustained by the cases. However harsh the rule may at first appear to be, it has been long established, and is well founded on maxims of public convenience; and viewing the carrier in the light of an insurer, it is of the utmost importance to him, as well as to the public who deal with him, that the acts for which he is to be excused should have a plain and well defined meaning. When it is understood that no act is within the exception, except such a violent act of nature as implies the entire exclusion of all human agency, the liabilities of the carrier are plainly marked out, and a standard is fixed by which the extent of the compensation to indemnify him for his risks can be readily measured, and ascertained. The rule, too, when so understood, puts to rest many perplexing questions of fact, in the litigation of which, the advantage is always on the side of the carrier. Under this rule

enemy," for losses by whom the carrier is not liable. These phrases are understood to apply to nations with whom there is open war, and to pirates, who are considered as at war with all mankind.<sup>1</sup> But they do not include robbers and thieves, or rioters and insurgents, whatever be their violence.<sup>2</sup>

§ 753. A common carrier is not, however, responsible for losses arising from the ordinary wear and tear of transportation; or for deterioration in quantity or quality, arising from any inherent tendency in the goods to decay or damage, as for leakage and fermentation or rotting without his default;<sup>3</sup> or for injury or damage resulting from the default of the owner, or shipper,<sup>4</sup> such as defective packing. So, also, there are cases of great exigency, where the loss is occasioned by the act of the carrier, in which the law, in consideration of the necessity of the case, excuses him. Thus, if he make a jettison of goods, to lighten a ship or boat, in danger of foundering, or to preserve life, he will not be responsible for the loss. But it would be otherwise, if such jettison be made rashly,

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the carrier is not permitted to go into proofs of care or diligence, and the owner of the goods is not required to adduce evidence of negligence till the loss in question is shown to be the immediate result of an extraordinary convulsion of nature, or of a direct visitation of the elements, against which the aids of science and skill are of no avail."

<sup>1</sup> Angell on Carriers, § 200; Story on Bailm. § 526; 1 Bell, Comm. p. 559; Abbott on Shipping, p. 386, and note; 3 Kent, Comm. 216, 299; Pickering v. Barclay, 2 Roll. Abr. 248; Moss v. Slue, 1 Vent. R. 190; Coggs v. Bernard, 2 Lord Raym. R. 909.

<sup>2</sup> King v. Shepherd, 3 Story, R. 349.

<sup>3</sup> Warden v. Greer, 6 Watts, R. 425; Leech v. Baldwin, 5 Ib. 446. See Clark v. Barnwell, 12 Howard, U. S. R. 272; Brown v. Clayton, 12 Georgia R. 568.

<sup>4</sup> Story on Bailm. § 492, 493; 3 Kent, Comm. Lect. 48, p. 299, 300, 301; Hastings v. Pepper, 11 Pick. R. 41; Whalley v. Wray; 3 Esp. R. 74; Brind v. Dale, 8 Car. & Payne, R. 207; Gabay v. Lloyd, 3 Barn. & Cres. R. 793; Lawrence v. Aberdeen, 5 Barn. & Ald. R. 107; Stokes v. Saltonstall, 13 Peters, R. 181; Hawkes v. Smith, 1 Car. & M. R. 72.

imprudently, and unnecessarily.<sup>1</sup> Ordinarily, he is bound to exercise the greatest caution, and to remedy any neglect of the bailor when he perceives it, and can by care obviate its ill consequences. Thus, if he knowingly allow a cask of liquor to leak away on the road, it is no excuse that the cask was leaky when it was given in his charge, if he could have prevented its leaking by care.<sup>2</sup> So, also, if a dog be given him to carry with an insecure rope, and be thereby lost, he is liable, because he was bound to see that the rope was secure.<sup>3</sup>

§ 753 a. In respect to the carriage of slaves, it would seem that the duties of a common carrier are not the same as in the carriage of goods, and more nearly resemble the duties of a carrier of passengers. And this modification of the rule grows out of the very nature of the charge. Policy and humanity alike demand it. He cannot be stowed away like a package of goods; for if such a disposal of him could be tolerated in morals, the injury or death naturally consequent would disallow it. Therefore, as he cannot be treated like a bale of goods, the carrier is not responsible for him as such, but only in case of negligence and unskilfulness.<sup>4</sup> But if slaves have paid no hire for their passage, the carrier would only be liable for gross neglect.<sup>5</sup>

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<sup>1</sup> Mouse's case, 12 Co. R. 63; Smith *v.* Wright, 1 Caines, R. 43; 2 Kent, Comm. Lect. 4, p. 604; Jones on Bailm. § 107, 108; Story on Bailm. § 575; Bird *v.* Astcock, 2 Bulst. R. 280; 2 Roll. Abr. 567; Bancroft's case, cited in Kenrig *v.* Eggleston, Aleyn, R. 93.

<sup>2</sup> Stuart *v.* Crawley, 2 Stark. R. 324.

<sup>3</sup> Beck *v.* Evans, 16 East, R. 244. But see Chevallier *v.* Patton, 10 Texas R. 344.

<sup>4</sup> Boyce *v.* Anderson, 2 Peters, U. S. R. 150, and Mr. Justice Story's comments thereon; Story on Bailm. § 577, note 2; Clarke *v.* McDonald, 4 McCord, (S. Car.) R. 223; Williams *v.* Taylor, 4 Porter, (Ala.) R. 234. In this case a less stringent rule of responsibility was held. And see, also, McDaniel *v.* Emanuel, 2 Rich. (S. Car.) R. 455; Duncan *v.* Railway Co. 2 Rich. (S. Car.) R. 613.

<sup>5</sup> Williams *v.* Taylor, 4 Porter, (Ala.) R. 234.

§ 754. In cases of carriage by sea, the bills of lading often contain an exception of responsibility, for losses arising from "perils of the sea."<sup>1</sup> This term, which would naturally include only dangers arising immediately from the sea, and peculiar to it, has been construed to include within it captures by pirates;<sup>2</sup> losses by collision, where there is no blame;<sup>3</sup> destruction of goods at sea by rats, when there is a cat on board;<sup>4</sup> and all injuries and damages resulting to goods from

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<sup>1</sup> In the Schooner Reeside, 2 Sumner, R. 571, where bales of carpeting sent by the vessel were damaged by the leaking of a number of casks of oil, Mr. Justice Story says: "The only remaining question, then, is whether the damage to the goods in this case has been occasioned by the danger of the seas, for there is no dispute as to the fact of the actual damage. I am not satisfied that there was any bad stowage in this case; though it does appear to me, that, considering the nature of the principal cargo, (two hundred barrels of oil,) it would have been very fit and proper to have stowed the carpeting in a more prudent manner, in some other part of the vessel. I cannot attribute the damage in this case to any danger of the seas. It seems to me, that the weather was not worse than what must ordinarily be expected to be encountered in such a voyage; and the rolling of the vessel by a cross sea is an ordinary incident to every voyage upon the sea. The phrase 'danger of the seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence." *Elliot v. Rossell*, 10 Johns. R. 1.

<sup>2</sup> Abbott on Shipp. P. 3, ch. 4, § 1, 2, 5th ed.; 3 Kent, Comm. Lect. 47, p. 216, 217; Park, Ins. ch. 3; Pickering *v.* Barclay, 2 Rolle, Abr. 248; Barton *v.* Wolliford, Comberb. R. 56; 1 Phillips on Ins. ch. 13, § 7, p. 249.

<sup>3</sup> Smith *v.* Scott, 4 Taunt. R. 126; 3 Kent, Comm. Lect. 47, p. 230; Abbott on Shipp. P. 3, ch. 4, § 5, 5th ed.; Buller *v.* Fisher, 3 Esp. R. 67; 1 Bell, Comm. p. 579, 580, 581.

<sup>4</sup> Garrigues *v.* Coxe, 1 Binn. R. 592. But see 3 Kent, Comm. Lect. 48, p. 300, 301; Aymer *v.* Astor, 6 Cow. R. 266; Hunter *v.* Potts, 4 Campb. R. 205; Laveroni *v.* Drury, 16 Eng. Law & Eq. R. 510. A loss by worms eating in the bottom, is not a peril of the sea, but a loss by ordinary wear and decay. Park, Ins. 23; Rhol *v.* Parr, 1 Esp. R. 445; Martin *v.* Salem Ins. Co. 2 Mass. R. 420.

the effect of storms and tempests upon the ship.<sup>1</sup> A common carrier would not, therefore, be responsible for such injuries and losses. But this term does not include losses by embezzlement, theft, or robbery, by persons who are on board the vessel, or who come to the ship when she is not on the high seas; but only to robberies by pirates.<sup>2</sup> Nor does it include injury done to a vessel by worms.<sup>3</sup> So, if a vessel in the ordinary course of her voyage, being moored in harbor, float when the tide is in, but take the ground when the tide is low and thereby become strained, this is not a loss by the peril of the sea, as there was nothing fortuitous or accidental.<sup>4</sup> But a loss indirectly caused by the peril of the sea, if growing necessarily out of it, may come within the rule. Thus, where a vessel carrying hides and tobacco shipped much sea water whereby the hides were rendered putrid and emitted a fetid odor which injured the tobacco, but the water itself did not touch the tobacco, the loss was, nevertheless, held to be by the perils of the sea.<sup>5</sup> So, also, although leakage through stress of weather comes within the exception of perils of the sea, yet there may be cases where it would be incumbent on the carrier to dry goods so wet, if he could do so without great inconvenience.<sup>6</sup>

§ 754 a. The general rule, in cases of insurance, is *causa proxima non remota spectatur*; and, therefore, although, during

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<sup>1</sup> Abbott on Shipp. P. 3, ch. 3, § 9, 5th ed.; 1 Bell, Comm. § 501.

<sup>2</sup> King v. Shepherd, 3 Story, R. 349, 356; Abbott on Shipp. Pt. 3, ch. 4, § 3, p. 223, (5th ed.); Story on Bailm. § 528, 529.

<sup>3</sup> Hazard v. New Eng. Marine Ins. Co. 1 Sumner, R. 218; s. c. 8 Peters, S. C. R. 557.

<sup>4</sup> Magnus v. Butterner, 9 Eng. Law & Eq. R. 461, distinguishing Fletcher v. Inglis, 2 B. & Ald. R. 315.

<sup>5</sup> Montoya v. London Assurance Co. 4 Eng. Law & Eq. R. 500. And see Lawrence v. Aberdeen, 5 Barn. & Ald. R. 107; Gabay v. Lloyd, 3 Barn. & Cres. R. 793.

<sup>6</sup> Chonteaux v. Leech, 6 Harris, R. 224; Bird v. Cromwell, Missouri R. 58. But see Steamboat Lynx v. King, 12 Missouri R. 272.

the carriage of goods, the carrier may have been guilty of negligence, which occasioned an injury to the goods, yet, if those goods be totally destroyed subsequently by storm, or be thrown over to lighten the vessel, the carrier would not be responsible for their loss. So, also, if the ship should be unseaworthy, (which would ordinarily render the carrier responsible,) but the loss should occur by capture, he would not be liable.<sup>1</sup> So, where a canal boat was wrecked by an extraordinary flood, it was held, that the carrier was not responsible, although it appeared that on account of the lameness of one of his horses a delay was caused in passing the place where the accident happened.<sup>2</sup> But this rule must be understood with the limitation that if the immediate cause would not have occasioned the loss, unless the common carrier had been guilty of negligence, he will not be absolved from liability; for no loss will be a loss by "perils of the sea," where it could have been avoided by proper diligence.<sup>3</sup> Where, therefore, goods are improperly stowed on deck, and are swept away by the sea, the carrier will be responsible, unless he can show that the loss would have occurred, if the goods had been properly stowed.<sup>4</sup> So, where a steamboat on the Ohio River ran on to a rock and

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<sup>1</sup> Hastings *v.* Pepper, 11 Pick. 41; Bell *v.* Reed, 4 Binn. 127; Story on Bailm. § 514, 515, 516; King *v.* Shepherd, 3 Story, R. 356.

<sup>2</sup> Morrison *v.* Davis, 20 Penn. St. R. 171.

<sup>3</sup> Elliot *v.* Rossell, 10 Johns. 1; Kemp *v.* Coughtry, 11 Johns. 107; Smith *v.* Sheppard, cited in Abbott on Shipp. P. 3, ch. 4, § 1; Hahn *v.* Corbett, 2 Bing. 205; Proprietors of Trent & Mersey Navigation Co. *v.* Wood, 3 Esp. 127; s. c. 4 Doug. 287; Siordit *v.* Hall, 4 Bing. 607; Coggs *v.* Bernard, 2 Lord Raym. 909; Waters *v.* Merchants Louisville Ins. Co. 11 Peters, 213; Hand *v.* Baynes, 4 Whart. 204; Crosby *v.* Fitch, 12 Conn. 410; Fletcher *v.* Inglis, 2 B. & Ald. 315; Kingsford *v.* Marshall, 8 Bing. 458; Potter *v.* Suffolk Ins. Co. 2 Sumner, 197; Hodgson *v.* Malcom, 5 B. & P. 336; Colt *v.* McMechen, 6 Johns. 160; Bowmen *v.* Teall, 23 Wend. 306; King *v.* Shepherd, 3 Story, R. 349.

<sup>4</sup> Crane *v.* The Rebecca, cited Am. Jur. 1, 15; 3 Kent, Comm. Lect. 47, p. 206; Hastings *v.* Pepper, 11 Pick. R. 41; The Paragon, Ware, R. 324; Bell *v.* Reed, 4 Binn. R. 127; Hollingsworth *v.* Brodrick, 7 Adolph. & Ell. 40; Story on Bailm. § 413 *a*, 413 *b*, 413 *c*, 413 *d*.

stove a hole in the bottom, it was held that the carrier could not absolve himself from responsibility by the exception "dangers of the sea" without showing that he had used proper skill and diligence, and that the accident was unavoidable.<sup>1</sup> And unless the immediate cause of the loss be one which absolves the carrier from liability, he will be responsible, although the remote cause occasioning the loss be the irresistible act of God, or the king's enemies.<sup>2</sup> Thus, if a vessel be wrecked in a storm, and stranded, and the wreckers, who come on board, steal any part of the cargo, the carrier is liable, for the immediate cause of the loss is theft, and not the perils of the seas.<sup>3</sup>

§ 754 b. "Dangers of the river" is also another phrase by which common carriers on water sometimes limit their responsibility; and it has received nearly the same definition from the court as "perils of the seas."<sup>4</sup> Some new causes of loss would, however, come under this term, not strictly "perils of the seas,"—such as hidden obstructions in the river, newly placed, and not only not known to be there, but of such a character, that human skill or foresight could not have discovered and avoided them.<sup>5</sup> Against the phrase "dangers of the seas, roads, and rivers," is sometimes introduced into bills of lading.

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<sup>1</sup> *Whitesides v. Russell*, 8 Watts & Serg. R. 44.

<sup>2</sup> *Smith v. Sheppard*, cited supra; *King v. Shepherd*, 3 Story, R. 357; *Schieffelen v. Harvey*, 6 Johns. R. 170; *Elliott v. Rossell*, 10 Johns. R. 1; *Williams v. Branson*, 1 Murph. N. C. R. 417; *Jones v. Pitcher*, 3 Stew. & Port. 171, 180; *Campbell v. Morse*, 1 Harp. S. C. R. 468.

<sup>3</sup> *King v. Shepherd*, 3 Story, R. 354; *Waters v. Merchants Louisville Ins. Co.* 11 Peters, U. S. R. 213. See, also, *Thompson v. Whitmore*, 3 Taunt. R. 227.

<sup>4</sup> *Jones v. Pitcher*, 3 Stew. & Port. (Alab.) R. 135, 176; *Whitesides v. Russell*, 8 Watts & Serg. R. 44; *M'Gregor v. Kilgore*, 6 Ohio, R. 358; *Johnson v. Frier*, 4 Yerger, (Tenn.) 48; *Turney v. Wilson*, 7 Yerg. (Tenn.) R. 340; *Angell on Carriers*, § 168.

<sup>5</sup> *Williams v. Branson*, 1 Murph. (N. Car.) R. 417; *Whitesides v. Russell*, 8 Watts & Serg. 44.

By dangers of the *roads*, is to be understood dangers of the sea-roads where ships lie at anchor, or such dangers of roads upon the land as overturning of carriages and the like, but not losses from thieves while the goods are in transit.<sup>1</sup> The phrase “dangers and accidents of the seas and navigation” is construed to have a broader meaning than “perils of the seas;”—and where a vessel laden with goods arrived at London and was taken into dock to discharge, and for this purpose was fastened by tackle on one side to a loaded lighter outside of her, and on the other to a barge between her and the wharf, and in consequence of the breaking of the tackle she canted over and let in water through the port-holes, by which goods were damaged, the injury was held to be within the exception of the bill of lading.<sup>2</sup>

§ 754 c. But if, from the nature of the goods taken, they are liable to peculiar risks, and the carrier employs the utmost caution, and yet they are destroyed, he is excusable. Thus, where horses or other animals are transported by water, and in consequence of a storm they break down the partitions between them and kick each other to death, the carrier will be excusable, on the ground that it is a loss by “perils of the sea.”<sup>3</sup>

§ 755. A common carrier is liable for all losses occasioned by accidental fire,<sup>4</sup> or theft, robbery, and embezzlement by his own servants, or by other persons, although he may have used every precaution to prevent such occurrences. And in all cases, the *burden of proof* is on him, to exempt himself from liability, by placing the loss within the excepted cases; for, if the

<sup>1</sup> De Rothschild *v.* The Royal Mail Steam Packet Co. 14 Eng. Law & Eq. R. 327, and Bennett's note.

<sup>2</sup> Lawrie *v.* Douglass, 15 Mees. & Welsb. 746.

<sup>3</sup> Gabay *v.* Lloyd, 3 Barn. & Cres. 793; Lawrence *v.* Aberdein, 5 Barn. & Ad. 107.

<sup>4</sup> See Morewood *v.* Pollok, 18 Eng. Law & Eq. R. 341, and Bennett's note.

goods have never been delivered to the bailor, or his agent, or his consignee, the presumption is, that they have been lost by negligence.<sup>1</sup> But the burden of showing such non-delivery is on the plaintiff.<sup>2</sup> There is no difference as to his liability at the common law between cases of theft and of robbery by violence.<sup>3</sup> And if a special contract be made, exempting the carrier in case of loss by "robbery," this will not exonerate him, if the loss be by stealth, without force.<sup>4</sup>

§ 756. A carrier may, however, be a common carrier in some respects, and a private carrier in others.<sup>5</sup> Thus, if he be a common carrier of dry goods only, and money be sent by him, he will be responsible, in regard to the money, only for ordinary diligence, being, in respect thereof, only a private carrier. But if he be accustomed to carry both, or if it be the usage of trade to carry both, he will be responsible as a common carrier.<sup>6</sup> Thus, stage-coachmen, or masters of a steamboat, hold-

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<sup>1</sup> Story on Bailm. § 529, and cases cited; King *v.* Shepherd, 3 Story, R. 356; Forward *v.* Pittard, 1 T. R. 27, 33; Murphy *v.* Staton, 3 Munf. 239; Gilbart *v.* Dale, 5 Ad. & Ell. 543; Griffiths *v.* Lee, 1 Car. & P. 110; Christie *v.* Griggs, 2 Camp. 79; Stokes *v.* Saltonstall, 13 Peters, 181; Atwood *v.* Reliance Transp. Co. 9 Watts, R. 87; Hastings *v.* Pepper, 11 Pick. R. 41; Whitesides *v.* Russell, 8 Watts & Serg. 44.

<sup>2</sup> Woodbury *v.* Frink, 14 Illinois R. 279; Ringgold *v.* Haven, 1 California R. 108; Cameron *v.* Rich, 4 Strobb. R. 168.

<sup>3</sup> Citizens Bank *v.* Nantucket Steamboat Co. 2 Story, R. 37; King *v.* Shepherd, 3 Story, R. 356; Morse *v.* Shee, 1 Vent. R. 190, 238; Kemp *v.* Coughtry, 11 Johns. R. 107; Barclay *v.* Cuculla y Gana, 3 Doug. R. 389; The Trent & Mersey Nav. Co. *v.* Wood, 4 Doug. R. 287; Schieffelin *v.* Harvey, 6 Johns. R. 160; Watkinson *v.* Laughton, 8 Johns. 213. The rule is different by the Roman law. Gothofred ad Dig. Lib. 17, tit. 2, c. 52, § 3, n. 24; Valin, Tom. 1, p. 74; Sur L'Ordin. de 1672, Lib. 3, tit. 6, art. 26; Boulay Paty Droit Commerce, Tom. 4, tit. 10, § 15, p. 35; Pothier d'Assurance, n. 55.

<sup>4</sup> De Rothschild *v.* Royal Mail Steam Packet Co. 14 Eng. Law & Eq. R. 327. See Marshall *v.* Nashville Marine Ins. Co. 1 Humphreys, 99; Atlantic Ins. Co. *v.* Storrow, 5 Paige, 285.

<sup>5</sup> See Johnson *v.* Midland Railway Co. 4 Exch. R. 367, Parke, B.

<sup>6</sup> Kemp *v.* Coughtry, 11 Johnson, 107; Tylly *v.* Morrice, Carth. 485; Allen

ing themselves out as carrying merchandise and goods of a certain kind for hire, will be common carriers as to such goods; but if it be not their usual occupation and habit to carry money and bank-bills, and in a special case they do carry them and receive a compensation therefor, they will only be private carriers in respect to the money, and responsible for ordinary diligence. This would be specially the case where the coachman or steamboat master is acting as agent for the proprietors.<sup>1</sup>

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<sup>1</sup>. Sewall, 2 Wend. 327; s. c. 6 Wend. 335; *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, R. 17; 2 Kent, Comm. Lect. 40, p. 598.

<sup>1</sup> *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, R. 46. In this case Mr. Justice Story says, "The case of *Dwight v. Brewster*, 1 Pick. R. 50, 54, does no more than affirm, that the owners are liable, where they are common carriers, and the profit made by the carriage of bank-bills is within the scope of their business and for their account; and that of *King v. Lenox*, 19 Johns. R. 235, shows, that the owners are not bound for shipments not made in the course of the employment of the ship on their account, but on account of the privilege of the master. The case of *Middleton v. Fowler*, 1 Salk. 282, is, however, still more directly in point to the circumstances of the present case. There, the action was against the proprietors of a stage-coach for the loss of a trunk of the plaintiff; and Lord Chief Justice Holt was of opinion that the action did not lie, saying that a stage-coachman was not liable, within the custom, as a common carrier, unless such as take a distinct price for carriage of goods as well as persons; as wagons with coaches; and though money be given to the driver, yet that is a gratuity, and cannot bring the master within the custom, for no master is chargeable with the acts of his servant, but when he acts within the execution of the authority given by his master. The case of *Allen v. Lowell*, 2 Wend. R. 327, is not an authority the other way, for it was reversed upon error by the Court of Errors of New York; *Lowell v. Allen*, 6 Wend. R. 335. If I were compelled to choose between the relative authority of these decisions, upon the ground of the reasoning contained therein, I should certainly have deemed that of the Court of Errors the best founded in the principles of law. The reasoning of the court below in that case seems to me to have been founded mainly upon an assumption of the very point in dispute; that is, whether the owners of the steamboat were common carriers of money for hire; for no one can well doubt, that they were not liable therefore, if the ordinary employment of the steamboat, on account of the owners, was confined to passengers and common merchandise for hire, and that the carriage of money was a perquisite of the master, upon his own sole account,

§ 757. A common carrier is bound to receive and carry all goods offered for transportation, upon offer or tender of a

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and he received the same and pay therefor, not by their authority or as a part of their business, or by their command, but simply at his own personal risk as special bailee. The knowledge of the owners, that he carried the money for hire, would not affect them unless the hire was for their account, or the master held himself out as their agent in that business, as being within the scope of the usual employment and service of the steamboat. That is the true doctrine, and is fairly deducible from the case of *Edwards v. Sherret*, 1 East, R. 600, although the circumstances of that case called for a somewhat modified statement of it. The case of *Sheldon v. Robinson*, 7 New Hamp. R. 157, directly decided, that the driver of a stage-coach (the proprietors of which were common carriers of passengers for hire) did not, by carrying packages of money and bank-bills for hire, which he received for his own sole account, become himself responsible as a common carrier; but was merely a common bailee for hire, and subject only to the responsibilities thereof; which necessarily supposes, that he did not in such cases act as agent of the proprietors in their common stage-coach business; and that they were not responsible for his acts.

“ In short, in all cases of this sort, the true solution of every question of the liability of the owners of a steamboat must depend upon this, whether the master is acting within the scope of the ordinary employment of the owners of the boat, or not. If the master alone receives the hire for himself, and on his own sole account, and does it as a matter of favor and not of duty, and it constitutes no part of the business or employment in which the owners are engaged, and is not performed by their orders or authority, and they are entitled to no share of the profits, then the owners are not responsible, unless indeed the owners hold the master out to the public as acting in these respects for them, and as capable of binding them by his acts. And my judgment, therefore, is that the *onus probandi* is upon the libellants, to establish that the owners are common carriers to the full extent of incurring liability for the carriage of these bills, before they are entitled to recover. If they leave the matter in doubt, that is decisive for the respondents.

“ It is precisely in this view, that the evidence, as to the supposed usage or practice introduced into this case, is admissible, not to show, if the owners were common carriers of bank-bills for hire, some usage or practice to treat them as not liable for losses of bank-bills intrusted to them, for I am not prepared to say, that any such evidence would be admissible to control the well-established rules of law; but as evidence to show what was the ordinary employment or business of the company, and whether they ever held themselves out to the public as common carriers of bank-bills for hire, or that the master

suitable compensation ; and if he refuse, he is liable for an action, unless there be a reasonable ground for such refusal.<sup>1</sup> And if, in his ordinary course of business dealing with the public, a carrier is in the habit of carrying packed parcels, he cannot refuse to receive and carry packed parcels for a particular individual. Neither has a carrier a right, in every case, and under all circumstances, to require information of the contents of packages tendered him to carry.<sup>2</sup> And a carrier who

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was authorized as master to contract for the carriage thereof on their account. In this view, it appears to me that the evidence is exceedingly strong and cogent to establish that the public did not understand that the company ever held themselves out as common carriers of bank-bills for hire, or even as gratuitous bailees, or that the masters of the steamboat ever held themselves out as capable or authorized to bind the company by any such contract, or that it was within the scope of the ordinary employment or business of the company. Most of the witnesses, as has been already suggested, treat it clearly as a case of personal agency of the master on his own personal account, either as a common bailee for hire, or as a gratuitous bailee. The weight of the evidence, indeed, seems to lead to the conclusion, that the master acted often, if not generally, as a gratuitous bailee, and that the reward sometimes paid him was either a mere gratuity, or at most a mere personal charge on his own account. If it was a mere gratuity, it would be difficult to show how the company could be liable therefor, since it would be almost incredible that they should be willing to incur such extraordinary risks without any compensation ; and, indeed, since it might well be questioned whether any such business was within the scope and objects of their charter. At all events, no presumption of this sort should be indulged, unless upon the most direct and positive proofs that the company had expressly sanctioned and authorized it." See, also, *Fish v. Ross*, 2 Kelly, (Georgia,) R. 355; *Shelden v. Robinson*, 7 N. Hamp. R. 157; *Story on Bailm.* § 501; *Bean v. Sturtevant*, 8 N. Hamp. R. 146.

<sup>1</sup> *Pickwick v. Grand Junction Canal Co.* 9 Dow, Parl. Cas. 776; *Cole v. Goodwin*, 19 Wend. 251; *Jackson v. Rogers*, 2 Show. R. 327; 1 Saund. R. 312, note; *Lane v. Cotton*, 1 Lord Raym. 646; *Batson v. Donovan*, 4 B. & Ald. 32; *Lovett v. Hobbs*, 2 Show. R. 128; *Edwards v. Sherratt*, 1 East, R. 604; *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 Howard, (U. S.) R. 344.

<sup>2</sup> *Crouch v. London & Northwestern Railway Co.*, 25 Eng. Law & Eq. R. 287, Jervis, C. J., says, "With respect to the third point, I think the fifty-seventh plea is bad. No authority has been cited to show that a carrier is entitled in every case to know the nature and quality of the goods tendered

generally carries from a place within to a place without the realm, is still chargeable upon the custom of the realm, if he without sufficient cause refuse to receive a parcel directed to a place beyond the realm.<sup>1</sup> He may, however, refuse to take goods, when his vehicle is full, or when the risk sought to be imposed is of an extraordinary nature, or when the goods are of a sort which he cannot convey, or is not in the habit of conveying,<sup>2</sup> or when they are bought at an unseasonable time, or when he has no convenient means of carrying the goods with security, or when the goods are of a nature which exposes them to extraordinary danger or popular rage, or where, on demand, the offerer refuses to pay in advance for them.<sup>3</sup> But when

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to him to be carried ; and on looking at the other provisions of the act of parliament, there seems to be no reason why the defendants should make the inquiry. With reference to dangerous articles they are entitled by the act to know the nature and quality, and they must be disclosed to them at the time of the delivery ; and if the company suspect articles to be of a dangerous nature, they may open the packages. So, also, with respect to goods of a peculiar value, provision is made by the act ; if the value is not disclosed at the time of the delivery and payment in the nature of an insurance made accordingly, the liability of the carrier is limited, and the consignee, in the event of loss or damage, cannot, by reason of the concealment, recover the full value. In these respects, therefore, the carrier is protected by the law ; but even if it be reasonable under certain circumstances that he should be informed of the contents of a parcel, the plea should have stated that there was a reason on this occasion for requiring the information. It is not alleged in the plea that there was a reason. The plea is founded on a general proposition, that in the case of all goods of whatsoever nature or quality, sent to a common carrier's, the person delivering them is bound to know, and be able to state if required, their nature and quality. Now, I think, if that be so, the consequences would be so highly inconvenient, that we should require authority to support it. I think, therefore, that the plea is bad, though, if it were necessary to say so, I should be of opinion, on the facts found by the arbitrator, that it was proved."

<sup>1</sup> *Crouch v. London and North-western Railway Co.* 25 Eng. Law and Eq. R. 287. And see *Morse v. Slue*, 1 Ventr. 190; *Benett v. Peninsular and Oriental Steamboat Co.* 6 Com. B. Rep. 775.

<sup>2</sup> *Johnson v. The North Midland Railway Co.* 4 Excheq. R. 367.

<sup>3</sup> *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 Howard, (U. S.) R.

the party avers and proves his willingness to pay for the carriage, it will be equivalent to a tender.<sup>1</sup>

§ 757 a. In respect to the *compensation* of a carrier, we have already seen that it is not required to be a fixed sum, but may be in the nature of a *quantum meruit*.<sup>2</sup> When he has specific rates of charges, he is ordinarily bound to carry at such rates, and cannot refuse to carry in a particular case, unless he is paid an exorbitant sum, or one above his charges to others.<sup>3</sup> Yet if in the special case he assumes an extraordinary risk, he may charge a remuneration proportional to such risk,<sup>4</sup>—as if he be to carry money across a dangerous country.<sup>5</sup> But he is not bound to accept goods until he is ready to set forth on his accustomed journey.<sup>6</sup> So, also, he is bound to provide vehicles suitable for the purposes of carriage; to proceed without deviation,<sup>7</sup> and by the usual route,<sup>8</sup> to guard against all dangers; to expose the goods to no improper hazard; and to obey the direction of the owners, with regard to them.<sup>9</sup> If, therefore, the carrier violate any specific directions

344; Story on Bailm. § 586; Fish *v.* Ross, 2 Kelly, (Georgia,) R. 355; Lovell *v.* Hobbs, 2 Show. R. 127; Jackson *v.* Rogers, 2 Shower, R. 327; Edwards *v.* Sherratt, 1 East, R. 604; Pickard *v.* Grand Junction Railway, 12 Mees. & Welsb. R. 766.

<sup>1</sup> Pickwick *v.* Grand Junction Railway, 9 Dow, Parl. Cas. 776.

<sup>2</sup> Ante, § 751.

<sup>3</sup> Crouch *v.* Great Northern Railway Co. 25 Eng. Law & Eq. R. 449. Parker *v.* Great Western Railway Co. 8 Eng. Law & Eq. R. 426 and 447.

<sup>4</sup> See Halford *v.* Adams, 2 Duer, 471.

<sup>5</sup> Gordon *v.* Hutchinson, 1 Watts & Serg. 285; Riley *v.* Horn, 5 Bing. R. 217; Steinman *v.* Wilkins, 7 Watts & Serg. 466; Hollister *v.* Nowlen, 19 Wend. R. 239, 241; Tylly *v.* Morrice, Carth. R. 486; Shelden *v.* Robinson, 7 N. Hamp. R. 157; Orange Co. Bank *v.* Brown, 9 Wend. R. 114.

<sup>6</sup> Lane *v.* Cotton, 1 Lord Raym. R. 652; 1 Com. R. 105.

<sup>7</sup> As to delays in transportation, see Wibert *v.* N. Y. and E. Railroad, 19 Barbour, R. 36.

<sup>8</sup> Powers *v.* Davenport, 7 Blackford, R. 497.

<sup>9</sup> Story on Bailm. § 509, and cases cited; Streeter *v.* Horlock, 1 Bing. R. 34; s. c. 7 Moore, R. 283.

of the sender as to the carriage of the goods, and they are destroyed by a cause exempting him from responsibility, as by perils of the sea, yet the carrier is also bound to prove that the loss did not arise from his disobedience of the sender's orders. Thus, if a person should send by a common carrier a box marked "this side up, with care," and the carrier should disobey his directions, he would be obliged to prove that the loss did not occur in consequence of his disregard of orders.<sup>1</sup> If the transmission of the goods be countermanded by the consignor, the carrier is bound to redeliver to him.<sup>2</sup>

§ 757 b. Again, a carrier is bound to carry the goods to their destination without delay.<sup>3</sup> Yet it would seem that he would not be responsible for any reasonable delay occasioned by an unusual amount of freight, beyond the capacity of the road to carry.<sup>4</sup> And it is clear that delay in itself would not operate as a conversion, so as to make the carrier liable for the whole value of the goods intrusted to him; but it would only render him responsible for the actual damages caused thereby.<sup>5</sup> If the delay be caused by freshet, and the carrier be guilty of no negligence, he would not be responsible for damages resulting therefrom, if there were an exception to his liability for losses from "perils of the sea."<sup>6</sup>

§ 758. A common carrier is not liable until the goods are

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<sup>1</sup> Hastings *v.* Pepper, 11 Pick. R. 41; Camoys *v.* Scurr, 9 Car. & Payne, 383; Humphreys *v.* Reed, 6 Whart. 435; Clark *v.* Spence, 10 Watts, R. 336; Hollingworth *v.* Brodrick, 7 Adolph. & Ell. R. 40; Davis *v.* Garrett, 6 Bing. R. 716.

<sup>2</sup> Scotthorn *v.* South Staffordshire Railway Co. 18 Eng. Law & Eq. R. 553.

<sup>3</sup> Bourne *v.* Gatliff, 11 Clark & Finell. R. 45, 70; Rome Railroad Co. *v.* Sullivan, 14 Georgia R. 277.

<sup>4</sup> Wibert *v.* New York and Erie R. R. Co. 2 Kernan, R. 245; Hand, J., dissented. See, also, Parsons *v.* Hardy, 14 Wend. R. 215.

<sup>5</sup> Scovill *v.* Griffith, 2 Kernan, R. 509; Hawkins *v.* Hoffman, 6 Hill, R. 586.

<sup>6</sup> Lipford *v.* Charlotte and South Carolina Railroad, 7 Richardson, R. 409.

delivered, either to him or to his authorized agent,<sup>1</sup> for carriage, and accepted. The acceptance may be either actual or constructive;<sup>2</sup> and if goods be deposited for carriage at the proper place, and the fact be known to the carrier, it will be sufficient to render him responsible.<sup>3</sup> Nor is it necessary that the goods should be entered on a way-bill or freight-list; for this is only evidence of the contract.<sup>4</sup> But if it be unknown to the carrier or his agents, he will not be liable.<sup>5</sup> If, however, there be an evident intention not to trust the carrier,—as if the servant of the owner be sent with the goods, to take care of them, the common carrier is not responsible.<sup>6</sup> But the mere fact that the servant goes with them will not, of itself, exempt the carrier from responsibility, if the other circumstances show that the carrier was to have the care and custody.<sup>7</sup> So, also, if goods be placed in the vehicle of a common carrier without notice or knowledge on his part, he would not be liable.<sup>8</sup> So, also, if a passenger assume the care of

<sup>1</sup> See *Blanchard v. Isaacs*, 3 Barbour, R. 388.

<sup>2</sup> See *Merriam v. Hartford &c. Railroad Co.* 20 Conn. 354.

<sup>3</sup> See *Moses v. Boston & Maine R. R.* 4 Foster, 71; *Woods v. Devin*, 13 Ill. R. 746.

<sup>4</sup> *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, R. 16; *Parker v. Great Western Railway Co.* 7 Man. & Granger, R. 253.

<sup>5</sup> *Selway v. Holloway*, 1 Ld. Raym. R. 46; 1 Bell, Comm. 464; *Buckman v. Levi*, 3 Camp. R. 414; *Hackard v. Getman*, 6 Cow. R. 757; *Dale v. Hall*, 1 Wils. R. 281; *Boehm v. Combe*, 2 M. & Selw. 172; 2 Kent, Comm. Lect. 40, p. 604; *Lovett v. Hobbs*, 2 Shower, R. 128; *Leigh v. Smith*, 1 Car. & Payne, 640.

<sup>6</sup> *East Ind. Co. v. Pullen*, 2 Str. R. 690; *Robinson v. Dunmore*, 2 B. & P. R. 419; *Schieffelin v. Harvey*, 6 Johns. R. 170; *Marsh. Ins. B. 1*, ch. 7, § 5, p. 252; *Reecker v. Lond. Assur. Co.* Ibid.; *Gibson v. Culver*, 17 Wend. 305; *Duff v. Budd*, 3 Brod. & Bing. 177; *Storr v. Crowly*, 1 McLel. & Younge, 129, 138; *Bodenham v. Bennett*, 4 Price, R. 34; *Birkett v. Willan*, 2 B. & Ald. R. 356; *White v. Winnisimmet Co.* 7 Cush. R. 156.

<sup>7</sup> *Abbott on Shipp.* P. 2, ch. 2, § 3, 5th ed.; *Cobban v. Downe*, 5 Esp. R. 41; *Brind v. Dale*, 2 Mees. & Welsb. 775; *Hollister v. Newland*, 19 Wend. R. 234; *Story on Bailm.* § 533; *Gatliffe v. Bourne*, 4 Bing. N. C. 314, 330.

<sup>8</sup> *Lovett v. Hobbs*, 2 Show. R. 127; *Leigh v. Smith*, 1 Car. & Payne, 640;

any portion of his luggage, and take it inside a coach with him, or carry it upon his person, the carrier will not be liable therefor in this country ; for some delivery and acceptance, either express or implied, by the carrier, is necessary.<sup>1</sup> So where a coat was delivered to the driver of a coach by a person not a passenger, to be delivered at a certain place, and the driver refused to put it on the way-bill, saying he had no right to do so, and the coat was lost, it was held that the proprietor of the coach was not responsible therefor as a common carrier, on the ground that there had been no delivery and acceptance by him.<sup>2</sup>

§ 758 a. It is ordinarily necessary that a delivery by the bailor should be made at the *time* and *place* designated by the notice of the carriers, or by usage, in order to render them responsible. Yet if merchandise be received by them at a different time or place, they will be responsible therefor,<sup>3</sup> on the ground that the conditions of time and place are thereby waived. So, in respect to the *person* to whom delivery is made, the bailor must exercise care and diligence; for if he deliver to a wrong party, without the knowledge of the carrier, the latter will not be responsible, unless he have held out the party to whom delivery is made, as his agent,<sup>4</sup> in which case the delivery would be good.<sup>5</sup>

§ 758 b. But as soon as the goods are fairly delivered, the responsibility of the common carrier attaches to them, even

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Selway v. Holloway, 1 Ld. Raym. R. 46. But see Merriam v. Hartford Railroad Co. 20 Conn. 354.

<sup>1</sup> Tower v. Utica & Schenectady Railroad Co. 7 Hill, R. (N. Y.) 47; Boys v. Pink, 8 Car. & Payne, 361; Syms v. Chaplin, 5 Adolph. & Ell. 634; Cohen v. Frost, 2 Duer, 335. But the rule is different in England. See post, § 768.

<sup>2</sup> Blanchard v. Isaacs, 3 Barbour, S. C. R. 388.

<sup>3</sup> Pickford v. Grand Junction Railway Co. 12 Mees. & Welsb. 766; Phillips v. Earle, 8 Pick. R. 182.

<sup>4</sup> Buckman v. Levi, 3 Camp. R. 414; Selway v. Holloway, 1 Lord Raym. R. 46; Walter v. Brewer, 11 Mass. R. 99; King v. Lenox, 19 Johns. R. 235.

<sup>5</sup> Cobbam v. Downe, 5 Esp. R. 41.

before they are on the journey. Thus, where a puncheon of rum was injured in letting it down into the hold of a vessel, it was held that the carrier was liable.<sup>1</sup> So, also, where baggage was received by a railway company, and locked up to be sent by the next conveyance, it was held, that the railway company held it as common carriers, and were answerable as such in case of loss.<sup>2</sup> In the case of carriers by water, a delivery will be considered as made, as soon as they are delivered by the wharfinger and accepted by the carrier, although they remain on the wharf.<sup>3</sup>

§ 759. The carrier's risk terminates as soon as the goods are deposited at their proper place of destination.<sup>4</sup> And such place may be determined by usage, in cases where no special orders are given.<sup>5</sup> If there be a special direction, with

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<sup>1</sup> *Goff v. Cluckard*, cited in *Dale v. Hall*, 1 Wils. R. 281. See, also, *Randleson v. Murray*, 8 Adolph. & Ell. 109; *Camden & Amboy Railroad Co. v. Belknap*, 21 Wend. R. 354.

<sup>2</sup> *Camden & Amboy Railroad Co. v. Belknap*, 21 Wend. R. 354.

<sup>3</sup> *Cobbam v. Downe*, 5 Esp. R. 41; *Morse v. Slue*, 1 Vent. R. 190, 238; *Ld. Raym. R. 919*.

<sup>4</sup> See *Graff v. Bloomer*, 9 Barr, 114; *Smith v. Nashua & Lowell Railroad*, 7 Foster, R. 86.

<sup>5</sup> *Merriam v. Hartford & New Haven Railroad Co.* 20 Conn. R. 354. In this case Storrs, J., said: "The plaintiff claimed to have proved, on the trial, that the property, to recover the value of which this action was brought, was delivered by him, to be transported by the defendants, as common carriers, from the city of New York to Meriden, at a dock in said city, which was the private dock of the defendants, and in their exclusive use, for the purpose of receiving property to be transported by them; and that it was delivered there, in the usual and accustomed manner in which the defendants received property for transportation; and the court charged the jury, that such delivery at said dock, was a good delivery to the defendants, to render them liable for the loss of the property, although neither they nor their agents were otherwise notified of such delivery. The defendants insist, that they were not chargeable for it, unless they had express or actual notice of such delivery; and that the jury should have been so instructed."

"A contract with a common carrier for the transportation of property, being one of bailment, it is necessary, in order to charge him for its loss, that

regard to person or place, it must be complied with, or the carrier will be responsible ; but otherwise, there must be a per-

it be delivered to and accepted by him for that purpose. But such acceptance may be either actual or constructive. The general rule is, that it must be delivered into the hands of the carrier himself, or of his servant, or some person authorized by him to receive it; and if it is merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or is placed in the carrier's cart, vessel, or carriage, without the knowledge and acceptance of the carrier, his servants or agents, there would be no bailment or delivery of the property, and he, consequently, could not be made responsible for its loss. Addison on Cont. 809. But this rule is subject to any conventional arrangement between the parties in regard to the mode of delivery, and prevails only where there is no such arrangement. It is competent for them to make such stipulations on the subject as they see fit ; and when made, they, and not the general law, are to govern. If therefore, they agree that the property may be deposited for transportation at any particular place, and without any express notice to the carrier, such deposit merely would be a sufficient delivery. So if, in this case, the defendants had not agreed to dispense with express notice of the delivery of the property at their dock, actual notice thereof to them would have been necessary ; but if there was such an agreement, the deposit of it there, merely, would amount to constructive notice to the defendants, and constitute an acceptance of it by them. And we have no doubt, that the proof by the plaintiff of a constant and habitual practice and usage of the defendants to receive property at their dock for transportation, in the manner in which it was deposited by the plaintiff, and without any special notice of such deposit, was competent, and in this case, sufficient to show a public offer, by the defendants, to receive property for that purpose, in that mode ; and that the delivery of it there accordingly, by the plaintiff, in pursuance of such offer, should be deemed a compliance with it on his part ; and so to constitute an agreement between the parties, by the terms of which the property, if so deposited, should be considered as delivered to the defendants, without any further notice. Such practice and usage was tantamount to an open declaration, a public advertisement, by the defendants, that such a delivery should, of itself, be deemed an acceptance of it by them for the purpose of transportation ; and to permit them to set up against those who had been thereby induced to omit it, the formality of an express notice, which had thus been waived, would be sanctioning the greatest injustice, and the most palpable fraud.

" The present case is precisely analogous to that of the deposit of a letter for transportation in the letter-box of a post-office, or foreign packet vessel, and to that of a deposit of articles for carriage in the public box provided for that purpose, in one of our express offices ; where it would surely not be

sonal delivery to the owner, unless there be some usage or custom to the contrary.<sup>1</sup> So long, however, as the carrier retains the possession of the goods, or is to perform any further duty, he is liable. The fact, that the vehicle in which he carries breaks down, or by any accident becomes unsuited for carriage, does not, in the least, absolve him from all the liabilities of common carrier, but he is bound to procure another conveyance, and to take charge of the goods in the intermediate time; and his responsibility remains until the goods arrive at their terminus and are delivered.<sup>2</sup> If, therefore, after such an accident the goods be embezzled, or lost by theft or robbery, the carrier is liable.<sup>3</sup> But wherever the owner receives them into his exclusive custody, the responsibility of the carrier is terminated. So when goods are placed on board a lighter, after arrival, and are to be carried to the wharf by the carrier, he is responsible; but if the owner undertake to carry them to the

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claimed, that such a delivery would not be complete, without actual notice thereof to the head of these establishments or their agents.

"The only authorities cited by the defendants, to show that an express notice to them was necessary in this case, are *Buckman v. Levi*, 3 Camp. 414, and *Packard v. Getman*, 6 Cowen, 757. These cases are distinguishable from the present in this respect, that there was not, in either of them, a claim of any particular habit or usage of the defendant, which should vary or modify the general principles of law in regard to the mode of delivering the property. They were, therefore, decided merely on those general principles, unaffected by any special agreement between the parties on that subject, inferable from such usage. But in several of the cases cited, it was held, that where the carrier had been in the habit of receiving property for transportation in a particular mode, a delivery to him in that mode, was sufficient."

<sup>1</sup> Story on Bailm. § 508, 539, 540, 542, 553, and cases cited; *Strong v. Natally*, 4 B. & P. 16; *Marsh. Ins.* B. 1, ch. 7, § 5, p. 252; *Sparrow v. Caruthers*, 2 Str. 1236; *Bowman v. Teall*, 23 Wend. R. 306; *In re Webb*, 8 Taunt. R. 443; 2 Moore, R. 500; *Parsons v. Hardy*, 14 Wend. R. 215; *Richardson v. Goss*, 3 B. & P. R. 119; *Scott v. Petit*, 3 B. & P. R. 472; *Dixon v. Baldwin*, 5 East, R. 181; *Rowe v. Pickford*, 8 Taunt. R. 83; s. c. 1 Moore, 526; *Allan v. Gripper*, 2 Cromp. & Jerv. 218; s. c. 2 Tyrw. R. 217.

<sup>2</sup> *King v. Shepherd*, 3 Story, R. 360; *Elliott v. Russell*, 10 Johns. R. 1.

<sup>3</sup> *Ibid. Morse v. Slue*, 1 Vent. 190, 338; *Barclay v. Cuculla y Gana*, 3 Doug. R. 389; *The Trent & Mersey Nav. Co. v. Wood*, 4 Doug. R. 287.

wharf, the owner is responsible.<sup>1</sup> A delivery on the usual wharf will be a delivery, so as to avoid the responsibility of the carrier; provided that the consignee receive due and reasonable notice before such delivery is made, so as to enable him to remove the goods, or to take charge of them.<sup>2</sup> If, however, he be unable, or refuse to receive them, the carrier cannot leave them on the wharf, but must take care of them for him.<sup>3</sup> Where the wharfinger or warehouse-man has accepted the custody of the goods, the carrier's responsibility ceases, as soon as the tackle of the other party is affixed to them.<sup>4</sup> But if the carrier undertake to land the goods, or hoist them into a warehouse, and the tackle break, he would be liable.<sup>5</sup>

§ 759 a. Again, the delivery to the consignee must be within a reasonable time after the arrival of the ship or wagon.<sup>6</sup> Of course, if the time be expressly prescribed within which delivery must be made, the agreement in such

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<sup>1</sup> Story on Bailm. § 542; Bowman *v.* Teall, 23 Wend. R. 306; Strong *v.* Natally, 4 B. & P. R. 16; Abbott on Shipp. P. 4, ch. 4, § 3, 5th ed.; St. John *v.* Santvoord, 25 Wend. R. 660; Catley *v.* Wentringham, Peake, Nisi Prius Cases, 140.

<sup>2</sup> Hyde *v.* Trent & Mersey Navigation Co. 5 T. R. 389; Abbott on Shipp. P. 4, ch. 4, § 3; 2 Kent, Comm. Lect. 40, p. 604, 605; Gatliff *v.* Bourne, 4 Bing. N. C. 314, 330; s. c. 3 Man. & Gr. 687; Syeds *v.* Hay, 4 T. R. 260; Chickering *v.* Fowler, 4 Pick. 371; Cope *v.* Cordova, 1 Rawle, R. 203; Kohn *v.* Packard, 3 Miller, Louis. R. 225; Story on Bailm. § 544, 545; Ostrander *v.* Brown, 15 Johns. R. 39; Pickett *v.* Downer, 4 Verm. 21; 2 Kent, Comm. Lect. 40, p. 604.

<sup>3</sup> Mayell *v.* Potter, 2 Johns. Cas. 371; Stephenson *v.* Hart, 4 Bing. R. 476; Chickering *v.* Fowler, 4 Pick. 371; Cope *v.* Cordova, 1 Rawle, R. 203; Gatliff *v.* Bourne, 3 Man. & Grang. 687.

<sup>4</sup> Thomas *v.* Day, 4 Esp. R. 62.

<sup>5</sup> De Mott *v.* Laraway, 14 Wend. R. 225.

<sup>6</sup> Hand *v.* Baynes, 4 Whart. R. 209, 210; Parsons *v.* Hardy, 14 Wend. R. 215; Bowman *v.* Teall, 23 Wend. R. 306; Abbott on Shipp. p. 4, ch. 4, § 3; Gatliffe *v.* Bourne, 4 Bing. N. C. R. 314; Story on Bailm. § 545 a; Raphael *v.* Pickford, 6 Scott, N. R. 478; Favor *v.* Philbrick, 5 N. Hamp. R. 358.

respect must be exactly fulfilled, and he will be liable, even though such a delivery be rendered impossible.<sup>1</sup> So, also, delivery must be made at a reasonable time; and a carrier of specie, undertaking to deliver it to a bank, could not show in defence, that he had gone to deliver it out of banking hours, and having found the bank shut, had not employed diligence to discover at what time he could deliver it.<sup>2</sup> So, also, a delivery of merchandise to a consignee after business hours, and when the consignee has dismissed his servants, so that he cannot receive it, is not a good delivery.<sup>3</sup>

§ 759 b. Delivery must also be made to the right *person*; for otherwise the carrier will be responsible, although the mistake be innocently made; because such a wrongful delivery is considered as a conversion of the property.<sup>4</sup> Ordinarily, the carrier is bound to deliver the goods personally to the consignee, unless there be some special contract to the contrary, or some implied agreement growing out of usage or previous habits of dealing. This doctrine was strenuously opposed by Lord Kenyon in a celebrated case, but the other judges agreed in differing from him; and Mr. Justice Buller, in delivering the judgment, affirmed the rule above stated.<sup>5</sup> It has also met with the approbation of distinguished judges in subsequent cases, and may be considered as established.<sup>6</sup> Where there is

<sup>1</sup> Hand *v.* Baynes, 4 Whart. (Penn.) R. 214; *Ante, Conditional Contracts; Post, Performance.* But see Dows *v.* Cobb, 12 Barb. R. 310; Lowe *v.* Moss, 12 Ill. R. 477.

<sup>2</sup> Merwin *v.* Buller, 17 Conn. R. 138; Young *v.* Smith, 3 Dana, (Kent,) R. 92.

<sup>3</sup> Hill *v.* Humphreys, 5 Watts & Serg. R. 123; Eagle *v.* White, 6 Whart. (Penn.) R. 505.

<sup>4</sup> See *ante, Bailees for Hire*; Stephenson *v.* Hart, 4 Bing. R. 476; Duff *v.* Budd, 3 Brod. & Bing. R. 177; Youl *v.* Harbottle, Peake, R. 49; Devereux *v.* Barclay, 2 B. & Ald. R. 702; Stephens *v.* Elwall, 4 M. & S. R. 259; Powell *v.* Myers, 26 Wend. R. 591.

<sup>5</sup> Hyde *v.* Trent Nav. Co. 5 T. R. 389.

Duff *v.* Bird, 3 Brod. & Bing. R. 177; Bodenham *v.* Bennett, 4 Price, R.

a general usage, and *a fortiori*, where there is a particular usage between the carrier and the consignee, to leave the goods at a particular spot, a delivery there will be sufficient; and if no notice be customary, no notice will be required.<sup>1</sup>

§ 759 c. Where, however, the consignee is dead, or after due diligence, cannot be found, the carrier may discharge himself from liability, by storing the goods with a third person, for and on account of the owner, and the storekeeper will then become the bailee of the latter.<sup>2</sup> Mere delivery on a wharf in such case would not be sufficient, where there was no one to take charge of them.<sup>3</sup> But this doctrine would only apply to cases where there was no distinct usage or custom of trade contravening it, and making a material portion of the carrier's contract. If, therefore, it be the common and established usage for the carrier to deposit the goods in a certain warehouse or on a certain wharf, a delivery there would seem to be sufficient, if notice be previously given,<sup>4</sup> and the carrier's responsibility would either be ended, if the warehouse or wharf did not belong to him, or if it did, he would be responsible merely as warehouse-man or wharfinger.<sup>5</sup> Such a usage,

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34 ; *Birkett v. Willan*, 2 Barn. & Ald. R. 356 ; *Storrs v. Crowly*, 1 McLell. & Younge, R. 129, 138 ; *Stephenson v. Hart*, 4 Bing. R. 476 ; *Gibson v. Culver*, 17 Wend. R. 305 ; *Eagle v. White*, 6 Whart. (Penn.) R. 505 ; *Chickering v. Fowler*, 4 Pick. R. 373 ; *Story on Bailm.* § 543.

<sup>1</sup> *Farmers, &c. Bank v. Champlain Transportation Co.* 16 Verm. R. 52 ; s. c. 18 Verm. R. 131.

<sup>2</sup> *Ostrander v. Brown*, 15 Johns. R. 39 ; *Fisk v. Newton*, 1 Denio, R. 45 ; *Smith v. Nashua & Lowell R. R. Co.* 7 Foster, R. 93 ; *Cleland v. Tucker-mann*, 17 Barbour, R. 184. See post, § 759 d.

<sup>3</sup> *Humphreys v. Reed*, 6 Whart. (Penn.) R. 435 ; *Hemphill v. Chenie*, 6 Watts. & Serg. R. 62.

<sup>4</sup> As to the necessity of notice, see *Kohn v. Packard*, 3 Louis. R. 224 ; *Price v. Powell*, 3 Comst. 322 ; *Michigan Central Railroad Co. v. Ward*, 2 Mich. R. 538. See *supra*, note 1.

<sup>5</sup> *Thomas v. Boston & Providence Railroad Corp.* 10 Metcalf, R. 472 ; *Garside v. Trent & Mersey Nav. Co.* 4 T. R. 581 ; *Story on Bailm.* § 543 ; *Matter*

however, must be clearly made out to be well established and known.<sup>1</sup> For example, where a common carrier between Stourport and Manchester was employed to carry goods to Manchester, thence to be forwarded to Stockport, and he landed them at B., and deposited them in his own warehouse, where they were consumed by fire, it was held, that as the warehousing of the goods was according to the known and established custom in such cases, the common carrier's responsibility was only that of a warehouse-man, after the delivery in the warehouse. Mr. Justice Buller said: "The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods, for whom the voyage to Manchester is performed. It is the interest of the carrier to get rid of them directly, and it was only because there was no person ready at Manchester to receive these goods, that the defendants were obliged to keep them."<sup>2</sup> A still more important expression of the same doctrine is to be found in a late case in Massachusetts. The defendants, a railway corporation, were charged as common carriers for the loss of a roll of leather, which had been transported by them over their road and deposited in one of their warehouses, where it was lost. It appeared, that a teamster employed by the plaintiff called, before the loss, with the bill of freight, and inquired for the leather, which was pointed out to him; that he took away some of the rolls, and afterwards called again and inquired for the others; that he was directed where to look for them, but on looking, found only one. Notices also, it appeared, had been posted up by the defendants containing this expression: "Merchandise, while in the company's storehouse, is at the

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of Webb, 8 Taunt. R. 443; 2 Kent, Comm. p. 604. See, also, Ostrander *v.* Brown, 15 Johns. R. 39; Gibson *v.* Culver, 17 Wend. R. 305; Blin *v.* Mayo, 10 Verm. R. 56; Van Stantwood *v.* St. John, 6 Hill, R. 158; Angell on Carriers, § 304; Storr *v.* Crowley, McLell. & Younge, R. 136; Chickering *v.* Fowler, 4 Pick. R. 371.

<sup>1</sup> See Dixon *v.* Dunham, 14 Ill. R. 324.

<sup>2</sup> Garside *v.* Trent & Mersey Nav. Co. 4 T. R. 581. See, also, Farmers & Mechanics Bank *v.* Champlain Trans. Co. 16 Verm. R. 60.

risk of the owners thereof." It appeared also, that it was the well-known and established usage on the part of the railway company to store goods in their warehouses, after the carriage was completed, there to wait the convenience of the consignee. Under these circumstances, and in view of the usage and the notice, it was held, that the railway company were only liable as warehouse-men, and not as common carriers.<sup>1</sup>

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<sup>1</sup> *Thomas v. Boston & Providence Railroad Comp.* 10 Metcalf, R. 472. In this important case, Mr. Justice Hubbard, in delivering the judgment of the court, fully considers this question. He says: "The important question presented for the consideration of the court is, whether the defendants are common carriers of the goods and merchandise intrusted to their care; and if they are, how long this relation continues. The charge on this part of the case was, that the jury, from all the evidence in the case, were to ascertain what was the contract between the parties; and if, from the evidence, they were satisfied that it was the usage and practice of the defendants, not only to transport goods over their road, but also to deposit them in their warehouses, without charge, until the owner of the goods should have reasonable time to remove them, and that they did provide warehouses or depots for the purpose of so storing the goods, then this usage and conduct would be sufficient evidence for the jury to find that it was a part of the contract that the defendants should so store and keep goods delivered to them for transportation; and that, if such was the contract, their liabilities as common carriers would continue while the goods were so stored in the depot."

"There is a material distinction between common carriers and other bailees of goods, as to the extent of their liability in the event of loss of the goods, or damage happening to them. The former are liable, as before remarked, in all cases, with certain precise exceptions; while the latter are only liable for want of proper care and reasonable diligence, according to the character of the bailment. And the question in the present case is, whether the defendants are liable as common carriers, after the goods are safely stored in their merchandise depot.

"The transportation of goods and the storage of goods are contracts of a different character; and though one person or company may render both services, yet the two contracts are not to be confounded or blended; because the legal liabilities attending the two are different. The proprietors of a railroad transport merchandise over their road, receiving it at one dépôt or place of deposit, and delivering it at another, agreeably to the direction of the owner or consignor. But from the very nature and peculiar construction of the road, the proprietors cannot deliver merchandise at the warehouse of the owner, when situated off the line of the road, as a common wagoner can do.

But if the company be guilty of negligence in not delivering the goods to the consignee on demand, they are liable as warehouse-men, in case the goods are destroyed by an accidental fire, while in their possession.<sup>1</sup>

759 d. Ordinarily, however, unless there be an express custom or usage authorizing a common carrier to store goods in

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To make such a delivery, a distinct species of transportation would be required, and would be the subject of a distinct contract. They can deliver it only at the terminus of the road, or at the given dépôt, where goods can be safely unladed and put into a place of safety. After such delivery at a dépôt, the carriage is completed. But, owing to the great amount of goods transported and belonging to so many different persons, and in consequence of the different hours of arrival, by night as well as by day, it becomes equally convenient and necessary, both for the proprietors of the road and the owners of the goods, that they should be unladed and deposited in a safe place, protected from the weather and from exposure to thieves and pilferers. And where such suitable warehouses are provided, and the goods, which are not called for on their arrival at the places of destination, are unladed and separated from the goods of other persons, and stored safely in such warehouses or dépôts, the duty of the proprietors as common carriers is, in our judgment, terminated. They have done all they agreed to do; they have received the goods, have transported them safely to the place of delivery, and, the consignee not being present to receive them, have unladed them, and have put them in a safe and proper place for the consignee to take them away; and he can take them at any reasonable time. The liability of common carriers being ended, the proprietors are, by force of law, depositaries, of the goods, and are bound to reasonable diligence in the custody of them, and consequently are only liable to the owners in case of a want of ordinary care.

"In the case at bar, the goods were transported over the defendants' road, and were safely deposited in their merchandise dépôt, ready for delivery to the plaintiff, of which he had notice, and were in fact in part taken away by him; the residue, a portion of which was afterwards lost, being left there for his convenience. No agreement was made for the storage of the goods, and no further compensation paid therefor; the sum paid being the freight for carriage, which was payable if the goods had been delivered to the plaintiff immediately on the arrival of the cars, without any storage. Upon these facts, we are of opinion, for the reasons before stated, that the duty of the

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<sup>1</sup> Stevens v. Boston and Maine Railroad, 1 Gray, R. 277.

his warehouse, and hold them as bailee, the carrier is bound to deliver the goods to the person to whom they are sent, or to some person authorized to receive them, or at least to give notice of their arrival, and to offer to deliver them.<sup>1</sup> And in the

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defendants, as common carriers, had ceased on their safe deposit of the plaintiff's goods in the merchandise depot; and that they were then responsible only as depositaries without further charge, and consequently unless guilty of negligence in the want of ordinary care in the custody of the goods, they are not liable to the plaintiff for the alleged loss of a part of the goods.

" This view, which we have taken of the relation of the defendants to the plaintiff, as common carriers in the transportation of his goods, and as the depositaries of them when stored in their warehouse, and the distinct liabilities arising out of these different relations, is fully justified by the decision of the court of King's Bench, in the case of *Garside v. Proprietors of Trent and Mersey Navigation*, 4 T. R. 581. In that case, the defendants were common carriers between Stourport and Manchester. The plaintiff's goods were taken at Stourport to be carried to Manchester, and from Manchester, by another carrier, to Stockport; and by agreement, they were to be kept in the defendants' warehouse, without charge, and to be kept till called for by the carrier for Stockport. A parcel of the plaintiff's goods, whilst thus stored, after being transported by the defendants from Stourport to Manchester for the plaintiff, were accidentally burnt with the warehouse, and the plaintiff brought his action to recover the value of them of the defendants, charging them as common carriers. But the court were clearly of opinion, that the duties of the defendants, as common carriers, were ended on the storing of the goods, and that they then stood in the situation only of warehousemen, and were therefore not liable for the loss of the goods. Buller, J., remarked, that 'the keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods; for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly; and it was only because there was no person ready at Manchester to receive these goods, that the defendants were obliged to keep them.' And so in the case at bar, the plaintiff, who lived in a neighboring town, was not ready to receive all his goods, and they were left for his convenience, and not for any benefit to the defendants." The same rule was again laid down in *Norway Plains Co. v. Boston and Maine Railroad*, 1 Gray, R. 270. See, also, *Farmers and Mechanics Bank v. Champlain Transportation Co.* 16 Verm. 52; 18 Ib. 131; 23 Ib. 186; *Richards v. The London Railway*, 7 Com. B. Rep. 839; *Michigan Central Railroad Co. v. Ward*, 2 Michigan, 538; *Smith v. Nashua and Lowell Railroad*, 7 Foster, R. 86; *Clendaniel v. Tuckerman*, 17 Barbour, S. C. R. 184.

<sup>1</sup> *Nettles v. South Carolina Railroad*, 7 Richardson, R. 190; *Rome Railroad*

latter case he would hold the relation of common carrier to the goods until a reasonable time should have elapsed after the notice of their arrival is given to the consignee or his agent.<sup>1</sup> But in case of the absence of any person authorized to receive them, or of his refusal or neglect to receive them after reasonable notice, the carrier might store the goods, and in such case he would only have the responsibility of a warehouseman.<sup>2</sup> The true test by which the question, whether the carrier is liable as carrier or warehouse-man in a case where he stores goods immediately on their arrival, is the contract itself.<sup>3</sup> If the contract be to carry to a certain terminus, on arrival there, the carrier's responsibility as such would terminate. If it be to deliver to the consignee at a certain terminus or warehouse, then his responsibility as carrier would seem to exist until reasonable time after notice and offer to deliver. If it be to deliver personally to the consignee, he should so deliver them, if possible, and at all events he would be bound to give notice, and in case he should store the goods, he would be liable as carrier for a reasonable time.<sup>4</sup> What the contract is, is a question for the jury to determine.<sup>5</sup>

§ 759 e. Where the common carrier is a railway company, it is said that the presumption created by usage is that the

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Co. *v.* Sullivan, 14 Georgia R. 277; Michigan Central R. R. Co. *v.* Ward, 2 Michigan R. 538; Crawford *v.* Clark, 15 Illinois R. 561.

<sup>1</sup> Miller *v.* Steam Navigation Co. 13 Barb. R. 361; Goold *v.* Chapin, 10 Barb. R. 612; Norway Plains Co. *v.* Boston and Maine Railroad Co. 1 Gray, R. 270; Price *v.* Powell, 3 Comstock, R. 322; Michigan Central Railroad *v.* Ward, 2 Michigan, R. 538.

<sup>2</sup> Clendaniel *v.* Tuckerman, 17 Barb. S. C. R. 184; Goold *v.* Chapin, 10 Barb. S. C. R. 612; Ostrander *v.* Brown, 15 Johns. R. 39.

<sup>3</sup> Farmers and Mechanics Bank *v.* Champlain Trans. Co. 23 Verm. R. 187.

<sup>4</sup> Hyde *v.* Trent and Mersey Nav. Co. 5 T. R. 389; Golden *v.* Manning, 3 Wils. R. 429; Stephenson *v.* Hart, 4 Bing. R. 476; Garnett *v.* Willan, 5 Barn. & Ald. 56; Gibson *v.* Culver, 17 Wend. R. 305; Eagle *v.* White, 6 Whart. (Penn.) R. 505; Humphreys *v.* Reed, 6 Whart. (Penn.) R. 435.

<sup>5</sup> Chickering *v.* Fowler, 4 Pick. R. 371; Ackley *v.* Kellogg, 8 Cowen, R. 223.

goods are only to be carried to the platform or warehouse of the company and there discharged, and that if the consignee is not there to take them, and they are stored in his behalf (as it is the carrier's duty to do) the company are only liable as warehouse-men.<sup>1</sup> This is, however, only a presumption, and may be shown to be false. So, where the carriage is by ship or steamboat, although the general rule is, that the delivery must be to the consignee personally, yet a delivery on the wharf would generally be held sufficient to avoid liability as carrier, whenever it was justified by the custom and usage of the place,<sup>2</sup> and not otherwise.<sup>3</sup> In cases of transportation by railway, steamer, or ship, it would seem to be necessary for the carrier to give notice to the consignee of the arrival of the goods, and he could not, without giving notice and allowing reasonable time to the consignee, leave the goods uncared for.<sup>4</sup> Whether, however, after discharging goods at the terminus or on the wharf, his liability would be that of a common carrier or only that of a warehouse-man or wharfinger, in case he did not give notice, seems not to be settled. According to general principles he would be liable as carrier, unless he give notice; but his contract may be varied by usage and custom, and in a late case a strong intimation of opinion has been given, that no notice would be necessary to terminate a rail-

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<sup>1</sup> *Norway Plains Co. v. Boston and Maine Railroad*, 1 Gray, R. 270; *Thomas v. Boston and Providence Railroad Co.* 10 Metcalf, R. 472.

<sup>2</sup> *Cope v. Cordova*, 1 Rawle, (Penn.) R. 203; *Chickering v. Fowler*, 4 Pick. R. 371; *Farmers and Mechanics Bank v. Champlain Trans. Co.* 23 Verm. R. 212; *Hyde v. Trent and Mersey Navigation*, 5 T. R. 399; *Norway Plains Co. v. Boston and Maine R. R.* 1 Gray, R. 270. But see *Ostrander v. Brown*, 15 Johns. R. 39. The usage is not so on the Ohio River; see *Hemp-hill v. Chenie*, 6 Watts & Serg. R. 62.

<sup>3</sup> *Galloway v. Hughes*, 1 Bailey, S. C. R. 553; *Blin v. Mayo*, 10 Verm. R. 56; *Albatross v. Wayne*, 16 Ohio R. 513.

<sup>4</sup> *Fiske v. Newton*, 1 Denio, R. 45; *Pickett v. Downer*, 4 Verm. R. 21; *Gibson v. Culver*, 17 Wend. (N. Y.) R. 305; *Pacard v. Bordier*, 2 Kent, Comm. (6th Am. ed.) n. f. to p. 605; *Cope v. Cordova*, 1 Rawle (Penn.) R. 203; *Quiggin v. Duff*, 1 Mees. & Welsb. R. 174; *Packard v. Getman*, 6 Cowen, R. 757.

way company's liability as carrier, but after discharging the goods, its responsibility would be merely that of warehousemen, to take care of the goods, and store them properly.<sup>1</sup>

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<sup>1</sup> *Norway Plains Co. v. Boston and Maine R. R.* 1 Gray, R. 270. In this case Mr. C. J. Shaw said,—“ It was argued in the present case, that the railroad company are responsible as common carriers of goods, until they have given notice to consignees, of the arrival of goods. The court are strongly inclined to the opinion, that in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to be a substitute better adapted to the convenience of both parties. The arrivals of goods, at the larger places to which goods are thus sent, are so numerous, frequent, and various in kind, that it would be nearly impossible to send special notice to each consignee, of each parcel of goods, or single article forwarded by the trains. We doubt whether this is conformable to usage; but perhaps we have not facts enough disclosed in this case, to warrant an opinion on that question. As far as the facts on this point do appear, it would seem probable, that persons frequently forwarding goods, have a general agent, who is permitted to inspect the way-bills, ascertain what goods are received for his employers, and take them as soon as convenient after their arrival. It also seems to be the practice, for persons forwarding goods to give notice by letter, and inclose the railroad receipt, in the nature of a bill of lading, to a consignee or agent, to warn him to be ready to receive them. From the two specimens of the form of receipt given by these companies, produced in the present case, we should doubt whether the name of any consignee or agent is usually specified in the receipt and on the way-bill. The course seems to be, to specify the marks and numbers, so that the goods may be identified by inspection and comparison with the way-bill. If it is not usual to specify the name of a consignee in the way-bill, as well as on the receipt, it would be impossible for the corporation to give notice of the arrival of each article and parcel of goods. In the two receipts produced in this case, which are printed forms, a blank is left for the name of the consignee, but it is not filled, and no consignee in either case is named. The legal effect of such a receipt and promise to deliver, no doubt is, to deliver to the consignor or his order. If this is the usual or frequent course, it is manifest that it would be impossible to give notice to any consignee; the consignor is *prima facie* the party to receive, and he has all the notice he can have. But we have thought it unnecessary to give a more decisive opinion on this point, for the reason, already apparent, that in these receipts no consignee was named; and for another, equally conclusive, that Ames, the plaintiff's authorized agent, had actual notice of the arrival of both parcels of goods.”

§ 759*f.* The question has often been raised whether a railway company accepting goods marked to be forwarded to a

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See, also, Farmers and Mechanics Bank *v.* Champlain Trans. Co. 23 Verm. R. 187. But see *Miller v. The Steam Navigation Co.* 13 Barbour, S. C. R. 363. In this case Willes, J., said, "It is contended, on behalf of the appellants, that upon the arrival of the barge at the pier at Albany, their relation became changed from common carriers, to that of warehouse-men of the goods in question, and that as there is no negligence imputed to them, and as warehouse-men are only liable in case of negligence, no recovery can be had against them. The contract of shipment was to deliver the goods to F. M. Adams, the agent, at Albany, of the Rochester City Line, which line the respondent had selected for their transportation west of Albany; and, in my judgment, the appellants continued to hold the relation of common carriers in reference to the goods, until they were so delivered, or until a reasonable time should have elapsed after notice to the agent of their arrival, and an offer to deliver. We so ruled on a similar question in the case of *Goold and others v. Chapin & Mallory*, (10 Barb. 612). The appellants had no right to warehouse the goods, unless in case of the absence of the person authorized to receive them, or his refusal or neglect to receive them, after reasonable notice. If the contract was to deliver them to Adams, they had no more right to store them at Albany than at New York, or any intermediate point on the river, unless for one of the reasons mentioned. The legal obligations and liabilities of the appellants as common carriers, were fastened upon them from the time they received the goods in New York, until they had performed the service which the transaction implied, and delivered them agreeably to their contract, unless prevented by the conduct of the owner or his agents. There does not appear to have been any notice given to Adams of the arrival of the goods; no offer to deliver them to him; no act on the part of the appellants, indicating that they desired or intended to change their character from common carriers to that of warehouse-men. Adams went on board the barge some two or three hours after its arrival, and saw the trip book. He testifies that he had a boat near by, ready to take the goods from the float, upon which, as appears by the testimony of the captain of the barge, it was the invariable custom of the defendants to ship goods brought by them up the river, before they were delivered on board the canal boats. The goods in question were in the process of being passed from the barge to the float, and before it was completed, and while a portion of them was in the float and the residue in the barge, the fire drove away the hands engaged, and destroyed both the barge and float, with all the goods they contained. Under these circumstances, it is preposterous to contend that there was

place beyond the terminus of its line, renders itself responsible as common carrier to the ultimate place to which the goods are addressed, or is discharged from liability by a safe delivery to another carrier or to another line in connection with its own. In America the rule seems clearly to be established, that the mere acceptance by the railway company of goods addressed to a point beyond their terminus, if unaccompanied by any express agreement or special circumstances importing a different understanding, would only be responsible for losses occurring while the goods were in their hands, or passing over their own line; and that a safe delivery to another carrier or another line would absolve them from all liability.<sup>1</sup> The con-

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any thing like an attempt or intention to store the goods; or any occasion or justification for storing them, if such had been the intention. On the contrary, the appellants were merely preparing and getting ready to deliver them, but had not commenced the delivery. They were not in fact ready or in a situation to commence the delivery. The goods were still in their possession as common carriers, to all intents and purposes." See, also, *Smith v. Nashua and Lowell Railroad Co.*, 7 Foster, R. 86; *Rowe v. Pickford*, 8 Taunt. R. 83.

<sup>1</sup> In the case of *Hood v. The New York & New Haven R. R. Co.* 22 Conn. R. 1, Ellsworth, J., dissenting from the English rule, said: "We are aware that in the cases cited from the English books, it seems to be held that if a railroad company receives at its depot goods marked to be forwarded beyond its own road, and even beyond any other railroad, this is *prima facie* evidence of a contract to carry the goods to the place of destination. We will not say that in these English cases, since there was no evidence on the part of the defendants to disprove the *prima facie* case, the defendants were not rightly subjected in damages for a loss beyond their road. Indeed, the judges intimate that there may have been a partnership throughout the route. But if more than this is meant, and that a railroad company, by receiving freight at its depot, became responsible to carry it, as it were, by guaranty or insurance, to the place of destination, at any distance from the road, and that this is an inference which cannot be disproved by showing the facts, as in this case, we are not prepared to give it our assent. We think it an unnatural inference, and a contract not, of course, to be drawn from the fact, that a chartered company of limited extent has taken goods to carry over its road.

"But if we are wrong in this, it does not follow that the doctrine of the English cases, as to *freight*, is to be applied to *passengers*; passengers take

trary rule, however, obtains in England, and it is held that the receipt of goods so directed creates a *prima facie* contract to

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care of themselves. And even as to freight, were such a question before us, we believe the true doctrine to be this: where goods are delivered to a carrier, marked for a particular destination, without any directions as to their transportation and delivery, save such as may be inferred from the marks themselves, the carrier is only bound to transport according to the established usage of business in which he is engaged, whether the consignor knew of the usage or not. The carrier becomes a mere forwarder of the goods to the end of his own portion of the route, and is then bound to use due diligence in seeking for and handing over the goods to the next carrier."

Van Santvoord *v.* St. John, 6 Hill, R. 157, was the case of a box marked "J. Petre, Little Falls, Herkimer Co.;" it was delivered to the Swiftsure line, and the following receipt given: "Received from St. John on board Ontario, one box merchandise, marked J. Petre," &c. This was the contract. The usage to deliver to the next carrier was shown. And the construction of this contract was held to be, that the box had been delivered to the carrier with the intention that he should transport it in the usual and customary way, and that the usage of the business must be considered as one of the elements of the contract, and the shipper could not avail himself of his ignorance of this usage, it being his business to inform himself.

In the Farmers Bank *v.* The Champ. Trans. Co. 18 Verm. R. 140, Kellogg, J., commenting on Van Santvoord *v.* St. John, says: "The doctrine of that case is in substance this; that where goods are delivered to a carrier marked for a particular place, without any directions as to their transportation and delivery except such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of such usage or not. With the reasoning and authority of that case we are well satisfied. It is founded in good-sense, and sustainable upon principle."

In Nutting *v.* The Conn. Railroad Co. 1 Gray, R. 502, Metcalf, J., said: "On the facts of this case, we are of opinion that there must be judgment for the defendants. Springfield is the southern terminus of their road; and no connection in business is shown between them and any other railroad company. When they carry goods that are destined beyond that terminus, they take pay only for the transportation over their own road. What, then, is the obligation imposed on them by law, in the absence of any special contract by them, when they receive goods at their depot in Northampton, which are marked with the names of consignees in the city of New York? In our judgment, that obligation is nothing more than to transport the goods safely to

carry the goods safely to their final destination, subject to be rebutted by proof of an express or implied contract to the con-

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the end of their road, and there deliver them to the proper carriers, to be forwarded towards their ultimate destination. This the defendants did in the present case, and in so doing performed their full legal duty. If they can be held liable for a loss that happens on any railroad besides their own, we know not what is the limit of their liability. If they are liable in this case, we do not see why they would not also be liable, if the boxes had been marked for consignees in Chicago, and had been lost between that place and Detroit, on a road with which they had no more connection than they have with any railway in Europe. But the plaintiff seeks to charge the defendants on the receipt given by Clarke, their agent, as on a special contract that the boxes should be safely carried the whole distance between Northampton and New York. We cannot so construe the receipt. It merely states the fact, that the boxes had been received 'for transportation to New York.' And the plaintiff might have proved that fact, with the same legal consequences to the defendants, by oral testimony, if he had not taken a receipt. That receipt, in our opinion, imposed on the defendants no further obligation than the law imposed without it. The plaintiff's counsel relied on the case of *Muschamp v. Lancaster & Preston Junction Railway*, 8 Mees. & Welsb. R. 421, in which it was decided by the Court of Exchequer, that when a railway company take into their care a parcel directed to a particular place, and do not, by positive agreement, limit their responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking to carry the parcel to the place to which it is directed, although that place be beyond the limits within which the company in general profess to carry on their business of carriers. And two justices of the Queen's Bench subsequently made a like decision. *Watson v. Ambergate, Nottingham & Boston Railway*, 3 Eng. Law & Eq. R. 497. We cannot concur in that view of the law; and we are sustained in our dissent from it by the Court of Errors in New York, and by the Supreme Courts of Vermont and Connecticut. *Van Santvoord v. St. John*, 6 Hill, R. 157. *Farmers & Mechanics Bank v. Champlain Transportation Co.* 18 Vermont R. 140, and 23 Vermont R. 209; *Hood v. New York & New Haven Railroad*, 22 Conn. R. 1. In these cases the decision in *Weed v. Saratoga & Schenectady Railroad*, 19 Wend. R. 534, (which was cited by the present plaintiff's counsel,) was said to be distinguishable from such a case as this, and to be reconcilable with the rule, that each carrier is bound only to the end of his route, unless he makes a special contract that binds him further." See, also, *Jenneson v. The Camden & Amboy Railroad Co.* District Court of Philadelphia, January, 1856, reported in the American Law Register for February, 1856, p. 234, and the editor's note.

trary.<sup>1</sup> Of course, a railway company in both countries may render themselves liable for losses beyond their own terminus, by a specific undertaking to deliver goods at a particular place; —and where there is a business connection between different companies forming a continuous line of travel, by railway or other conveyances, one company may render itself responsible for losses occurring on the line belonging to another com-

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<sup>1</sup> *Muschamp v. The Lancaster & Preston Junction Railway Co.* 8 Mees. & Welsb. R. 421. In this case a parcel was delivered to the railway company at Lancaster addressed to a place in Derbyshire, beyond the line of the Lancaster & Preston Junction Railway. Baron Rolfe, before whom the cause was tried, told the jury that a carrier who takes into his care a parcel directed to a particular place, and does not, by positive agreement, limit his responsibility to a part only of the distance, undertakes *prima facie* to carry the parcel to its destination, and that the rule was not varied by the fact that that place was beyond the limits within which the carrier professed to carry. This ruling was sanctioned by the court in *banc*. The same rule was laid down in the subsequent case of *Watson v. Ambergate, Nottingham & Boston Railway Co.* 3 Eng. Law & Eq. R. 497. In this case a case of models or plans of a machine to load colliers was sent from Grantham to Cardiff to compete for a prize of one hundred guineas, but arrived too late for the competition. It appeared that when the package was delivered to the storing-master at Grantham he said he could only receive pay to Nottingham, as he had no rates beyond, and he erased the words "paid to Bristol" and substituted "paid to Nottingham" without the knowledge of the plaintiff. The original direction was left on the package, which was detained at Bristol, and did not arrive at Cardiff until the day after the award was made. The court held that the company was liable on a contract to carry from Grantham to Cardiff. So, also, in *Scothorn v. The South Staffordshire Railway Co.* 8 Excheq. R. 341; s. c. 18 Eng. Law & Eq. R. 553; the Court of Exchequer reaffirmed the doctrine of *Muschamp v. The Lancaster & Preston Railway*, and held, that where a carrier receives goods to carry from one station to another, he would be liable for any loss that should occur during the transit, though it should happen on a line of railway belonging to another company. And again, in *Crouch v. The London & North-Western Railway Co.* 14 C. B. R. 225; s. c. 25 Eng. Law & Eq. R. 287, the same rule was again restated after elaborate argument. See, also, *Wilson v. York, Newcastle & Berwick Railway Co.* 18 Eng. Law & Eq. R. 557, note; *Fowles v. Great Western Railway*, 16 Eng. Law & Eq. R. 531; *Walker v. York & North Midland Railway Co.* 22 Eng. Law & Eq. R. 315; *Bennett v. Filyaw*, 1 Florida R. 403.

pany.<sup>1</sup> The liability of each company would depend upon the special circumstances of the case; if there be a partnership or share of profit and losses, and not a mere arrangement in respect to times and connection of trains and the like, each company would be liable. But the mere fact that there was an arrangement for the purpose of transporting passengers or luggage continuously without loss of time would not be sufficient to create a liability as partners. Thus, where three separate railway companies, owning distinct portions of a continuous railway between two termini, run their carriages over the whole road, employing the same agent to sell passage tickets and receive luggage to be carried over the whole distance, an action may be maintained against any one of them for a loss of luggage received at one of its stations to be carried over the entire road.<sup>2</sup> Where, however, there are distinct sets of carrier companies, forming a continuous route of transportation, but in respect to which there is no joint interest in the passenger money, and no agreement as to its division, each making its own charge and issuing its separate tickets, making its own profits and responsible solely for its own losses, each company would be liable only for losses on its own branch of the route, although the several companies should combine their means of transportation, and

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<sup>1</sup> *Weed v. The Saratoga Railroad*, 19 Wend. R. 534; *Slocum v. Fairchild*, 7 Hill, R. 292; *Waland v. Elkins*, 1 Stark. R. 272; *Wilcox v. Parmelee*, 3 Sandf. R. 610; *Hart v. Rensselaer & Saratoga* R. R. 4 Selden, R. 37; *Fowles v. The Great Western Railway Co.* 7 Excheq. R. 699; s. c. 16 Eng. Law & Eq. R. 531; *Muschamp v. The Lancaster & Preston Junction Railway*, 8 Mees. & Welsb. R. 421; *Watson v. The Ambergate, &c.*, 3 Eng. Law & Eq. R. 497; *Noyes v. The Rutland Railway Co.* Am. Law Register for February, 1856, p. 231, per Redfield, J.; *Van Santvoord v. St. John*, 25 Wend. R. 660; s. c. 6 Hill, R. 157; *Farmers & Mechanics Bank v. Champlain Trans. Co.* 18 Verm. R. 140, and 23 Verm. R. 209; *Ackley v. Kellogg*, 8 Cowen, R. 223; *Hood v. N. York & N. Haven* R. R. 22 Conn. R. 502; *Scotthorn v. The South Staffordshire Railway Co.* 8 Excheq. R. 341; s. c. 18 Eng. Law & Eq. R. 553; *Crouch v. The London & North Western Railway Co.* 25 Eng. Law & Eq. R. 287.

<sup>2</sup> *Hart v. Rensselaer & Saratoga Railroad Co.* 4 Selden, R. 37.

advertise by their agent that the several routes formed a continuous and connected line of travel.<sup>1</sup>

§ 760. Such are the rights, duties, and liabilities of a common carrier, growing out of the general contract. We now come to the question, whether a carrier can limit his responsibility by an express contract, that he will not be liable for loss in certain excepted cases. It is well established, that a carrier may, by such an express contract with the consignor, reduced to writing, limit his general responsibility.<sup>2</sup> Thus, he may by a bill of lading except himself from all losses occasioned by "fire," or "perils of the seas."<sup>3</sup> This question was carefully considered, by the Supreme Court of the United States, in a late case, the circumstances of which were these. Wm. F. Harnden, being engaged in the business of carrying for hire small packages of goods, specie, and bundles of all kinds, for any persons choosing to employ him, to and from the cities of New York and Boston, and using the public conveyances between those cities as the mode of conveyance, made an agreement with the New Jersey Steam Navigation Company, by which they, for a certain consideration, allowed him the privilege of transporting, in their steamers between New York and Providence, a wooden crate of certain dimensions, on these conditions: "The crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the New Jersey Steam Navigation Company will not, in any event, be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evi-

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<sup>1</sup> *Briggs v. Vanderbilt*, 19 Barb. R. 222.

<sup>2</sup> *Parsons v. Monteath*, 13 Barb. R. 358; *Moore v. Evans*, 14 Barb. R. 524; *Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, R. 139; *Dorr v. N. J. & Cam. Nav. Co.* 4 Sandf. R. 136, affirmed on appeal, 1 Kernan, R. 485; *Stoddard v. Long Island Railroad Co.* 5 Sandf. R. 180; *Derwort v. Loomer*, 21 Conn. R. 246; *Kimball v. Rutland & Burlington R. R.* 26 Verm. R. 256; *Davidson v. Graham*, 2 Ohio St. R. 131.

<sup>3</sup> *Ante*, § 754.

dences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner, in the boats of the said company. Further, that the said Harnden is to attach to his advertisements, to be inserted in the public prints, as a common carrier, exclusively responsible for his acts and doings, the following notice, which he is also to attach to his receipts or bills of lading, to be given in all cases for goods, wares, and merchandise, and other property committed to his charge, to be transported in said crate or otherwise : ‘Take notice.—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be, and is transported, in respect to it or its contents, at any time.’” Upon the loss of certain moneys, which Harnden, by virtue of this contract, was carrying in the steamer Lexington when she was destroyed by fire, an action was brought against the company, charging them as common carriers; but it was held, that their liabilities as common carriers were restricted by the express contract. The court say, “As the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights of property,—the safe custody and delivery of the goods,—we are unable to perceive any well-founded objection to the restriction, or any stronger reasons forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties. The owner, by entering into the contract, virtually agrees, that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence.”<sup>1</sup> But unless a carrier

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<sup>1</sup> New Jersey Steam Nav. Co. v. The Merchants Bank, 6 Howard, (U. S.) R. 344. So, also, in Hollister v. Nowlen, 19 Wend. R. 234, Bronson, J.,

limit himself by special and express contract, as by a bill of lading excepting fire and perils by sea, he would be responsible therefor.<sup>1</sup>

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says: "I shall not deny that a carrier may by express contract restrict his liability; for though the point has never been expressly adjudged, it has often been assumed as good law. Aleyn, 93; 4 Co. 84, note to Southcoate's case; 4 Burr. 2301, per Yates, J.; 1 Vent. 190, 238; Peake, N. P. Cas. 150; 3 Taunt. 271; 1 Stark. R. 186. If the doctrine be well founded, it must, I think, proceed on the ground that the person intrusted with the goods, although he usually exercises that employment, does not in the particular case act as a common carrier. The parties agree that in relation to that transaction he shall throw off his public character, and, like other bailees for hire, only be answerable for negligence or misconduct. If he act as a carrier, it is difficult to understand how he can make a valid contract to be discharged from a duty or liability imposed upon him by law." In *Gould v. Hill*, 2 Hill, (N. Y.) 623, an opposite doctrine was held, and the court deny that the carrier, even by an express contract, limits his responsibility. But the case of *Gould v. Hill*, was expressly overruled in the same State, in the late cases of *Parsons v. Monteath*, 13 Barb. R. 353; *Dorr v. The New Jersey Steam Nav. Co.* 4 Sandf. R. 136; *Stoddard v. Long Island R. R. Co.* 5 Sandf. R. 180; *Moore v. Evans*, 14 Barb. R. 524. So, also, see *Atwood v. Reliance Trans. Co.* 9 Watts, (Penn.) R. 87. But in *Wells v. Steam Nav. Co.* 2 Comstock, (N. Y.) R. 204, the question is considered as debatable. And in a still later case in New York the doctrine of the text has been fully asserted. The Boston Daily Advertiser of October, 1850, copying from the New York Express, says: "The general term of the court of common pleas has decided that a common carrier has a right to make a special contract with those sending goods by him, a rule, the contrary to which has usually hitherto been held. The Merchants Mutual Insurance Company insured goods for a party at the West, which were placed on board a barge belonging to the Western Transportation Company, and burnt at the great fire at Albany, while on their way. The insurance company paid the loss and sued the transportation company, contending that they were bound to deliver the goods at the place of destination. The printed receipts of the transportation company expressly proved that they will not be liable for loss by fire. The court holds that said clause is good and valid, and gave judgment for the Transportation Company, no negligence having been shown on their part." *Dorr v. New Jersey Co.* 1 Kernan, R. 485. See *Swindler v. Hilliard*, 2 Rich. R. 286; *Camden & Amboy Railroad Co. v. Baldauf*, 16 Penn. St. Rep. 67; *Reno v. Hogan*, 12 B.

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<sup>1</sup> *Parker v. Flagg*, 26 Maine R. 181.

§ 760 *a*. But although a carrier may, in accepting goods, limit his liability by a special contract, yet after accepting them, he cannot refuse to execute his agreement, nor limit his liability by any subsequent notice to the consignor, except with the consent of the latter.<sup>1</sup>

§ 760 *b*. Where there is a special contract, the carrier is not liable thereon as a common carrier, but only as a special carrier; and his duties and liabilities are governed by the terms of his contract.<sup>2</sup> In such cases, therefore, the action should be upon the special contract, or for a breach of duty arising therefrom.<sup>3</sup> And if the declaration in such case set forth only the general liability of the defendant as a common carrier, the variance will be fatal.<sup>4</sup> Whether or not the facts of the case create a special contract, is, however, a question of law for the court, and not of fact for the jury.<sup>5</sup>

§ 760 *c*. And this leads naturally to the consideration of the effect of an indirect or implied contract growing out of a general or particular *notice* given by the carrier. By the rules of the old common law, there were but two exceptions to the liability of a common carrier, in case of loss; first, by the

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Monroe, R. 63; Farmers & Mechanics Bank *v.* Champlain Transp. Co. 23 Verm. R. 186; Sager *v.* The Portsmouth Railroad Co. 31 Maine R. 228; Walker *v.* York & N. Mid. R. Co. 3 C. & K. 279; Kimball *v.* Rutland & Bur. R. R. 26 Verm. R. 247.

<sup>1</sup> Merwin *v.* Butler, 17 Con. R. 138.

<sup>2</sup> Parsons *v.* Monteath, 13 Barbour, R. 358; Moore *v.* Evans, 14 Barbour, R. 524; New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 Howard, R. 314. See ante, § 760 *b*.

<sup>3</sup> Kimball *v.* Rutland and Burlington R. R. 26 Verm. R. 248; Shaw *v.* York & N. Midland Railway, 13 Queen's B. R. 347; Austin *v.* Manchester, &c. Railway Co. 5 English Law & Eq. R. 329; Crouch *v.* London and North-western Railway, 7 Excheq. R. 705.

<sup>4</sup> Davidson *v.* Graham, 2 Ohio St. R. 131; Fowles *v.* The Great Western Railway Co. 7 Excheq. R. 699; s. c. 16 Eng. Law and Eq. R. 531.

<sup>5</sup> Kimball *v.* Rutland and Burlington Railroad, 26 Verm. R. 248.

"act of God," and second, "by the king's enemies."<sup>1</sup> This broad rule was first judicially restricted in England by a decision in 1804, in which it was held that a carrier could limit his liability by a general or special notice that he would not be responsible for loss.<sup>2</sup> Since that decision, although much dissatisfaction has been repeatedly expressed, the doctrine has steadily grown, until it has become rooted into the common law of England.<sup>3</sup> It has found an able apologist in Mr. Justice Best; but the general opinion has been, that its operation is injurious. Mr. Bell, in a lively manner, thus states its consequences : " Of the extravagance into which this doctrine has run, and the distracting points which come to be involved in it the newspapers and the books of reports are full. One carrier frees himself from responsibility for *fire*; another even from the common responsibility of the contract, for negligence. One man is bound by a notice, which has appeared in a newspaper that he is accustomed to read; another person, because a large board was stuck up in his office; and another is freed from the effect of the notice in the office because handbills

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<sup>1</sup> *Hyde v. Proprietors of Trent and Mersey Nav. Co.* 1 Esp. R. 36; *Lesson v. Holt*, 1 Stark. R. 186; *Coggs v. Bernard*, 2 Ld. Raym. R. 909; *Forward v. Pittard*, 1 T. R. 27.

<sup>2</sup> *Nicholson v. Willan*, 5 East, R. 507. In *Smith v. Horne*, 8 Taunt. R. 144, Mr. Justice Burroughs says: "The doctrine of notice was never known until the case of *Forward v. Pittard*, 1 T. R. 27," decided in 1785; but nothing in relation to the doctrine of notice appears in such case, or in any case subsequent until that of *Nicholson v. Willan*.

<sup>3</sup> *Southcote's Case*, 4 Co. R. 84; *Morse v. Slue*, 1 Vent. R. 238; *Nicholson v. Willan*, 5 East, R. 507; *Clay v. Willan*, 1 H. B. R. 298; *Harris v. Packwood*, 3 Taunt. R. 264; *Evans v. Soule*, 2 Maul. & Sel. R. 1; *Smith v. Horne*, 8 Taunt. R. 146; *Batson v. Donovan*, 4 B. & Ald. R. 39; *Riley v. Horne*, 5 Bing. R. 217; *Bodenham v. Bennett*, 4 Price, R. 34; *Down v. Fremont*, 4 Camp. R. 41; *Lewes v. Kermody*, 8 Taunt. R. 147; *Story on Bailm.* § 549, 554; *Stat. 11 Geo. 4*; *Stat. 1 Will. 45*, ch. 68. There is an abridged statement of these statutes in *Harrison's Digest*, vol. 1, p. 551, tit. Carriers; also in *Hollister v. Nowlen*, 19 Wend. R. 243; *Smith on Merc. Law*, B. 3, ch. 2, p. 233-238.

were circulated of a different import. Then, it is said, what if he cannot read? or if he does not go himself, but sends a porter, and *he* cannot read? Or, what if he be *blind*, and cannot see the placard? And thus difficulties multiply; the courts are filled with questions, and the public left in uncertainty." The same learned writer also says: "The unhappy consequences of this doctrine are to be ascribed, as it would seem, to a wrong bias unfortunately admitted in the progress of its establishment, from not keeping a steady eye upon the principles which ought to have regulated the practice of giving notices. There seems to be only one point to which, legitimately, notices of carriers could be admitted, namely the regulation of the consideration for risk. Saving always the power of making an *express* contract, the effect of a mere notice ought justly to be restricted to this point; as to which alone it is competent for a carrier to refuse employment. Had this been attended to, the law on this subject would have been conformable to the general system of jurisprudence, and a sort of legislative power never would have been assumed by common carriers. Any exorbitancy of charge would at once have been brought to a true standard by judicial determination; while the responsibilities of the carrier, under the common law of his contract, and on the principles of public policy, would have remained untouched but by *positive* agreement in each individual."<sup>1</sup>

§ 760 d. This view taken by Mr. Bell seems to represent the general opinion in England; and an act of parliament, recently passed on the subject, has in a measure re-established the old common law doctrine, with the modifications here proposed.<sup>2</sup> But since the passage of that act a carrier has been held liable for goods feloniously taken by his own servants, through his

<sup>1</sup> Bell's Comm. 382.

<sup>2</sup> Stat. 1 William IV. c. 68; 11 George IV. See Angell on Carriers, § 256.

own gross negligence.<sup>1</sup> In the case of Hollister *v.* Nowlen,<sup>2</sup> Mr. Justice Bronson makes the following clear analysis of this act: "The act of parliament already mentioned enumerates various articles of great value in proportion to the bulk, and others which are peculiarly exposed to damage in transportation, and declares that the carrier shall not be liable for the loss<sup>3</sup> or injury of those articles when the value exceeds £10, unless at the time of delivery the owner shall declare the nature and value of the property,<sup>4</sup> and pay the increased charge which the carrier is allowed to make for his risk and care. If the owner complies with this requirement, the carrier must give him a receipt for the goods, 'acknowledging the same to have been *insured*;' and if he refuse to give the receipt, he remains 'liable and responsible *as at the common law*.' The provision extends to the proprietors of stage-coaches as well as all other carriers, and to property which may 'accompany the person of any passenger' as well as other goods; and the statute declares that after the first day of September, 1830, '*no public notice* or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit, or in anywise affect the liability at common law' of any carriers; but that all and every such carrier shall be 'liable *as at the common law* to answer' for the loss or injury of the property, '*any public notice* or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.'"<sup>5</sup>

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<sup>1</sup> Butt *v.* Great Western Railway, 7 Eng. Law & Eq. R. 443.

<sup>2</sup> 19 Wend. R. 234.

<sup>3</sup> By the word "loss" here is meant a loss by the carrier; such as an abstraction by his servants, or by a stranger, or by losing or mislaying the goods; and the word does not refer to every loss to the owner, as by delay in the delivery, or non-delivery of the articles by the neglect of the carrier. Hearn *v.* London & South-Western Railway Co. 29 Eng. Law & Eq. R. 494.

<sup>4</sup> This provision applies whether the goods are delivered to the carrier at his place of business, or elsewhere. Baxendale *v.* Hart, 9 Eng. Law & Eq. R. 505.

<sup>5</sup> But this act does not prevent the formation of a special contract, founded upon actual notice to a consignor, and his acquiescence therein. See Walker

§ 760 e. This is substantially the rule which obtains in America. Great reluctance has always been felt in this country to introduce limitations of the responsibility of a common carrier, on the ground that the interest of the public requires that he should be held to the strictest accountability, in view of the trust reposed in him, and the opportunities of collusion which grow out of his position. The modification of his liability by notices has never been recognized in this country, and the rule has always been, and is still, that he cannot, by a general or a special notice, absolve himself from his liability at common law.<sup>1</sup> The question was most fully considered in two cases in New York, and this doctrine laid down. One of these cases was an action against stage-coach proprietors, as common carriers, for the loss of baggage, they having given public notice to the following effect: "Baggage of the passengers at the risk of the owners;"<sup>2</sup> and it was held, that

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<sup>1</sup> York & North Midland Railway, 22 Eng. Law & Eq. R. 315. See post, § 760 g.

<sup>1</sup> See Camden Trans. Co. v. Belknap, 21 Wend. R. 354; and Clarke v. Paxton, 21 Wend. R. 153; Pardee v. Drew, 25 Wend. R. 459; Gould v. Hill, 2 Hill, N. Y. R. 623, where the same doctrine was held. See, also, Beckman v. Shouse, 5 Rawle, R. 179; Dwight v. Brewster, 1 Pick. R. 50; Atwood v. Reliance Transportation Co. 9 Watts, R. 87; 2 Kent, Comm. Lect. 40, p. 608; The Schooner Reeside, 2 Sumner, R. 567. See 1 Bell, Comm. 473-475, for a learned argument on the inconvenience of such notices. Story on Bailm. § 551. See, also, Fish v. Chapman, 2 Kelly, (Geo.) R. 360, upholding the same doctrine; and Hale v. New Jersey Steam Navigation Co. 15 Conn. R. 539; Bennett v. Dutton, 10 N. Hamp. R. 481; Bean v. Green, 3 Fairf. (Maine), R. 422; Moses v. Boston & Maine Railroad, 4 Foster, R. 71; Kimball v. The Rutland & Burlington Railroad Co. 26 Verm. R. 247; Jones v. Voorhees, 10 Ohio R. 145; Davidson v. Graham, 2 Ohio St. R. 131.

<sup>2</sup> Hollister v. Nowlen, 19 Wend. R. 239. In this case Mr. Justice Bronson says: "The argument is, that where a party delivers goods to be carried, after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods, subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is

such a notice was of no effect in limiting their responsibility. So, also, actual notice to a passenger in a stage-coach that his

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as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can at the most only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods, after seeing a notice, cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities.

" Making a notice the foundation for presuming a special contract, is subject to a further objection. It changes the burden of proof. Independent of the notice, it would be sufficient for the owner to prove the delivery and loss of the goods; and it would then lie on the carrier to discharge himself by showing a special contract for a restricted liability. But giving effect to the notice, makes it necessary for the owner to go beyond the delivery and loss of the goods, and prove that he did not assent to the proposal for a limited responsibility. Instead of leaving the *onus* of showing assent on him who sets up that affirmative fact, it is thrown upon the other party, and he is required to prove a negative, that he did not assent.

" After all that has been or can be said in defence of these notices, whether regarded either as a ground for presuming fraud or implying a special agreement, it is impossible to disguise the fact that they are a mere contrivance to avoid the liability which the law has attached to the employment of the carrier. If the law is too rigid, it should be modified by the legislature, and not by the courts. It has been admitted over and over again by the most eminent English judges, that the effect given to these notices was a departure from the common law; and they have often regretted their inability to get back again to that firm foundation. The doctrine that a carrier may limit his responsibility by a notice, was wholly unknown to the common law at the time of our Revolution. It has never been received in this, nor, so far as I have observed, in any of the other States. The point has been raised, but not directly decided. *Barney v. Prentiss*, 4 Har. & Johns. R. 317; *Dwight v. Brewster*, 1 Pick. R. 50. Should it now be received among us, it will be, after it has been

luggage is at his own risk, has been held to be of no avail to the carrier.<sup>1</sup> But the late English cases hold, that signing a ticket which expressly states that the goods are subject to the owner's risk, and that the carrier will not be liable for any damage, creates a valid special contract between the parties, under section 6 of the Carriers' Act, and is, therefore, the measure of liability.<sup>2</sup> This rule, however, does not obtain in America.

§ 760 *f.* But although a carrier cannot avoid or limit his responsibility by a notice, even where it is brought home to the knowledge of the other party,<sup>3</sup> yet he may by a notice require that the goods shall be delivered or tendered in a particular way, or that information shall be given to him of the value of any article, if it exceed a certain sum, and an additional price therefor be paid.<sup>4</sup> For such a notice is not considered as a limitation of his liability after the goods are received, but only as a *condition precedent* to his undertaking as common carrier, which, if it be reasonable and known to the consignor, ought to be allowed. Where, therefore, a general notice was given by a carrier, that he would not be liable over a certain amount, unless the value of goods were made known

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tried, condemned and, abandoned in that country to which we have been accustomed to look for light on questions of jurisprudence." See, also, Cole *v.* Goodwin, 19 Wend. R. 251, to the same point.

<sup>1</sup> Jones *v.* Voorhees, 10 Ohio R. 145. See, also, Cole *v.* Goodwin, 19 Wend. R. 251.

<sup>2</sup> Morville *v.* Great Northern Railway, 10 Eng. Law & Eq. R. 366; Chippendale *v.* Lancashire Railway, 7 Eng. Law & Eq. R. 395; Austin *v.* Manchester Railway, 5 Eng. Law & Eq. R. 329; s. c. 11 Id. 506; Carr *v.* Lancashire & Yorkshire Railway, 14 Id. 340; Walker *v.* York & North Midland Railway, 22 Eng. Law & Eq. R. 315; York, Newcastle, & Berwick Railway Co. *v.* Crisp, 25 Eng. Law & Eq. R. 396; Slim *v.* Great Northern Railway, 26 Eng. Law & Eq. R. 297.

<sup>3</sup> Kimball *v.* Rutland & Burlington Railroad, 26 Verm. 247; Dorr *v.* New Jersey Co. 1 Kernan, 485, and cases cited above.

<sup>4</sup> 2 Greenleaf on Evidence, § 215; 1 Bell, Comm. 382; Orange County Bank *v.* Brown, 9 Wend. R. 115; Fish *v.* Chapman, 2 Kelly, (Geo.) R. 349 Story on Bailm. § 557; Clarke *v.* Gray, 6 East, R. 564.

to him on delivery, and a premium for insurance paid, it was held, that such notice, if brought home to the knowledge of the owner, operated to qualify the acceptance of the goods, and that, in case he did not disclose the value and pay the premium, he could only recover the proposed sum.<sup>1</sup> Such a notice must, however, be brought home to the knowledge of the consignor, in order to bind him.

§ 760 *g.* The doctrine in England, as declared in the more modern cases, even since the passage of the Carriers' Act, is, that a carrier may, by special contract with the consignor, absolve himself from all liability in cases even of gross negligence.<sup>2</sup> And if, therefore, the consignor sign a paper declar-

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<sup>1</sup> *Orange County Bank v. Brown*, 9 Wend. R. 115.

<sup>2</sup> *Austin v. Manchester, Sheffield, &c. Railway Co.* 11 Eng. Law & Eq. R. 506; 10 Com. Bench R. 454. In this case Creswell, J., said: "The question to be considered then is, what was the nature of the contract entered into between the parties in this case? The ticket which contains the terms of the contract was issued subject to the owner's undertaking to bear all the risk of injury by conveyance or other contingencies. If this had been the only passage applicable to the risks to be borne by the owners, it might have been contended on their behalf that it did not extend beyond injuries sustained by reason of a journey by railway simply, or by means of some accident, and that it would not protect the carriers from the consequences of negligence on the part of themselves or the servants. But the ticket further states that the company will not be responsible 'for any damage, however caused, to horses, cattle, or live stock of any description, upon their railway or in their vehicles.' The framer of their declaration appears to have felt that this latter part of the ticket (or contract, for such it was) protected the company from liability if injury was sustained by the want of what is usually called due care, and therefore, after alleging that the defendants did not take due and proper care to provide against friction of the wheels and axles, he charges them with grossly and culpably neglecting to do so, by reason whereof and of the gross and culpable negligence of the defendants, the wheels of the carriage in which the horses were, took fire, and the injury complained of was sustained. And if the terms of the contract are not sufficient to exonerate the company from responsibility for damage resulting from such negligence as is imputed, the judgment cannot be arrested. The term 'gross negligence' is found in many of the cases reported on this subject, and it is manifest that no uniform mean-

ing that he “undertakes all risks of conveyance whatsoever; and the company will not be responsible for any injury or

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ing has been ascribed to those words, which are more correctly used in describing the sort of negligence for which a gratuitous bailee is held responsible, and have been somewhat loosely used with reference to carriers for hire.” And in *Hinton v. Dibbin*, a case depending on the Carriers’ Act, the 11 Geo. 4 & 1 Will. 4, c. 68, Lord Denman, in giving judgment, observed, with much truth, “It may well be doubted whether, between gross negligence and negligence merely, any intelligible distinction exists.” In *Owen v. Burnett*, Baron Bayley said: “As for the cases of what is called gross negligence, which throws upon the carrier the responsibility from which, but for that, he would have been exempt, I believe that in a greater number of them it will be found that the carrier was guilty of misfeasance. Such, certainly, were the cases of delivery to a wrong person, sending by a wrong coach, or carrying beyond the place to which the goods were consigned. But this observation will not explain all the decisions on the subject. There are others in which the carrier has been held liable for such negligence as warranted the court in holding that he had put off that character. But there is nothing in this declaration amounting to a charge of misfeasance or renunciation of the character in which the defendants received the goods. The charge is, that they ought to have taken precautions to guard against the consequences of friction of wheels and axles, and that they did not do so, and were guilty of gross negligence in not doing so. The terms ‘gross negligence’ ‘and culpable negligence’ cannot alter the nature of the thing omitted, nor can they exaggerate such omission into an act of misfeasance or renunciation of the character in which they received the horses to be carried. The question, therefore, still turns upon the contract, which, in express terms, exempts the company from responsibility for damages, however caused, to horses, &c. In the largest sense, those words might exonerate the company from responsibility even for damage done wilfully, a sense in which it was not contended that they were used in this contract; but giving them the most limited meaning they must apply to all risks of whatever kind and however arising to be encountered in the course of the journey, one of which is undoubtedly the risk of a wheel taking fire owing to neglect to grease it. Whether that is called ‘negligence’ merely, or ‘gross negligence,’ or ‘culpable negligence,’ or whatever other epithet may be applied to it, we think it is within the exemption from responsibility provided by the contract, and that such exemption appearing on the face of the declaration, no cause of action is declared, and that judgment must be arrested.” See, also, *Morville v. Great Northern Railway Co.* 10 Eng. Law & Eq. R. 366; *Owen v. Burnett*, 2 Cromp. & Mees. 353; 4 *Tyrwh. R.* 133; *Hinton v. Dibbin*, 2 Q. B. 646.

damage, however caused, occurring to live-stock travelling on their railway," the carrier would not be liable for any losses occasioned by gross negligence on his part.<sup>1</sup> This doctrine has not met with approbation in America, and the courts of this country have uniformly held that a common carrier cannot by

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<sup>1</sup> Carr v. Lancashire & Yorkshire Railway Co. 14 Eng. Law & Eq. R. 340. In this case Baron Parke said : " Prior to the establishment of railways, the court were in the habit of construing contracts between individuals and carriers, much to the disadvantage of the latter. Before railways were in use the articles conveyed were of a different description from what they are now. Sheep and other live animals are now carried upon railways, and horses which were used to draw vehicles are now themselves the objects of conveyance. Contracts, therefore, are now made with reference to the new state of things, and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks to which they are in modern times exposed. Horses are not conveyed on railways without much risk and danger ; the rapid motion, the noise of the engine, and various other matters are apt to alarm them and to cause them to do injury to themselves. It is, therefore, very reasonable that carriers should protect themselves against loss by making special contracts. The question is, whether they have done so here.

" The jury have found that the defendants have been guilty of gross negligence, and that must be taken as a fact. In my opinion the owner of the horse has taken upon himself the risk of conveyance, the railway company being bound merely to find carriages and propelling power ; the terms of the contract appear to me to show this. The company say they will not be responsible for any injury or damage (howsoever caused) occurring to live-stock of any description, travelling upon their railway. This, then, is a contract by virtue of which the plaintiff is to stand the risk of accident or injury, and certainly, when we look at the nature of the things conveyed, there is nothing unreasonable in the arrangement. In the case of Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company, 20 Law J. Rep. (N. S.) Q. B. 440 ; s. c. 5 Eng. Rep. 329, the language of the contract was different from the present, but not to any great extent. [His lordship stated the case.] In that case, the accident was occasioned by the wheels not being properly greased ; in the present case, the carriage that contained the plaintiff's horse was driven against another carriage. We ought not to fritter away the meaning of contracts merely for the purpose of making men careful. That is a matter that we are not bound to correct. The legislature may, if they please, put a stop to contracts of this kind, but we have nothing to do with them except to interpret them when they are made."

special contract absolve himself from losses arising either from his fraud or his gross negligence,—on the plain ground that a contrary rule would be against public policy, and impair all security in the necessary transmission of goods and merchandise.<sup>1</sup> According to the English rule, a common carrier may by his contract elude all those responsibilities, which the law has affixed to his character, and take advantages of the public necessities of travel, without incurring liability for even the grossest negligence and want of caution. If this be so, the doctrines hitherto held in relation to common carriers are entirely overturned. In this country the old rule still obtains, and notwithstanding, therefore, any notice that the carrier may give, he is bound to take ordinary care of goods intrusted to him, and he is liable, not only for any act which amounts to a total abandonment of his character as carrier, and for gross or wilful negligence, but also for a conversion or misfeasance, as by a delivery to a wrong person, where the mistake might have been avoided by ordinary care.<sup>2</sup> So, also, the carrier cannot, by demanding an exorbitant price, compel the owner to submit to oppressive limitations of his right.

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<sup>1</sup> See *Sager v. Portsmouth R. Co.* 31 Maine R. 228; *Reno v. Hogan*, 12 B. Monroe, 63; *Dorr v. N. J. Steam Nav. Co.* 4 Sandf. 136; *Stoddard v. Long Island Railroad Co.* 5 Sandf. 180; *Parsons u. Monteath*, 13 Barb. 353; *Camden & Amboy Railroad Co. v. Baldauf*, 16 Penn. St. R. 67; *Wells v. Steam Nav. Co.* 4 Selden, 375; *Laing v. Colder*, 8 Barr, R. 479; *Swindler v. Hiliard*, 2 Richardson, R. 286; *Slocum v. Fairchild*, 7 Hill, R. 292; *New Jersey Steamboat Co. v. Merchants Bank*, 6 Howard, U. S. R. 344; *Davidson v. Graham*, 2 Ohio R. 131.

<sup>2</sup> *Wylde v. Pickford*, 8 Mees. & Welsb. 443; *New Jersey Steam Navigation Co. v. The Merchants Bank*, 6 Howard, (U. S.) R. 344; *Owen v. Burnet*, 2 Cromp. & Mees. 353; *Bodenham v. Bennett*; 4 Price, R. 34; *Story on Bailm.* § 349, 549; *Messiter v. Cooper*, 4 Esp. R. 260; *Jones on Bailm.* 48; *Duff v. Budd*, 3 Brod. & Bing. 177; *Lyon v. Mells*, 5 East, R. 430; *Harris v. Packwood*, 3 Taunt. R. 264; *Batson v. Donovan*, 4 B. & Ad. 21, 32; *Stephenson v. Hart*, 4 Bing. R. 476; *Farmers & Mechanics Bank v. Champlain Trans. Co.* 23 Verm. R. 187.

§ 761. Wherever such notices are valid, they must be brought home to the knowledge of the bailor, or the carrier will still be responsible.<sup>1</sup> The mere fact that such a notice is exposed to view, in the office of the carrier, or is published in a newspaper, or circulated in printed handbills, is not sufficient in itself; unless there be other circumstances connected therewith which bring the notice constructively to the actual knowledge of the bailor.<sup>2</sup> Thus, although the notices be posted up at the booking office, this will not be sufficient, if the consignor cannot read,<sup>3</sup> or if, although he saw that there were notices, he did not read them, supposing them not to be material;<sup>4</sup> *a fortiori*, if there be any artifice in such case, as if the limitation of liability be printed in very small letters, so as not to attract attention, while the advantages of carriage are largely set forth, this rule would apply.<sup>5</sup> So, also, if there be two different notices at the same time, the carrier is bound by that which least limits his responsibility. And if at the time of the carriage he deliver a written notice, without any limitation of liability, his prior notice containing a limitation is thereby nullified.<sup>6</sup> So, also, if the notice be ambiguous, it will be construed against the carriers, on the ground that, if either party be to suffer, the one occasioning the mistake

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<sup>1</sup> See *Great Western Railway v. Goodman*, 11 Eng. Law & Eq. R. 546; *Camden & Amboy Railroad v. Baldauf*, 16 Penn. St. R. 67; *Brown v. Eastern Railroad Co.* 6 Boston Law Rep. N. C. 39, Sup. Jud. Court of Mass. 1851; *Moses v. The Boston & Maine Railroad*, 4 Foster, R. 71; *Jones v. Voorhees*, 10 Ohio R. 145; *Davidson v. Graham*, 2 Ohio St. R. 131; *Kimball v. Rutland & Burlington Railroad Co.* 26 Verm. R. 247.

<sup>2</sup> *Davis v. Willan*, 2 Stark. R. 279; *Gibbon v. Paynton*, 4 Burr. 2302; *Evans v. Soule*, 2 M. & S. R. 1; *Roskell v. Waterhouse*, 2 Stark. R. 462; 1 Bell, Comm. 475; *Kerr v. Willan*, 2 Stark. R. 53; *Clayton v. Hunt*, 3 Camp. 27; *Butler v. Heane*, 2 Camp. R. 415; *Story on Bailm.* § 558; *Brooke v. Pickwick*, 4 Bing. 218; *Jenkins v. Blizzard*, 1 Stark. R. 418. See, also, *Angell on Carriers*, § 248, § 249.

<sup>3</sup> *Davis v. Willan*, 2 Stark. R. 279.

<sup>4</sup> *Kerr v. Willan*, 2 Stark. R. 53.

<sup>5</sup> *Butler v. Hearne*, 2 Camp. R. 415.

<sup>6</sup> *Munn v. Baker*, 2 Stark. R. 255; *Cobden v. Bolton*, 2 Camp. R. 108.

should.<sup>1</sup> Indeed, it has been said, that, "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and, at the same time, place in his hands a printed paper specifying the precise extent of their engagement. If they omit to do this, they attract customers, under the confidence inspired by the extensive liability which the common law imposes upon carriers, and then endeavor to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them."<sup>2</sup> Neither can a carrier limit his liability by a mere by-law, which contravenes the general law; as a by-law that the carrier will not be responsible for the care of a passenger's luggage, unless the same be booked and the carriage paid for; the charter of the company allowing every passenger to take his luggage to a certain amount, free of charge.<sup>3</sup>

§ 762. If, however, in any case, artifices or fraud be practised, for the purpose of concealing the nature or value of the article to be sent, or deceiving the carrier, so that his diligence may be diminished, at the same time that his risk is increased, the contract will be void.<sup>4</sup> Thus, where the owner, in delivering a box of goods and money to the common carrier, told him that it contained a book and some tobacco, the jury were directed to consider the cheat in damages.<sup>5</sup> So, also, where notes to the amount of £100 were packed into an old mail bag and stuffed about with hay, the concealment was held to

<sup>1</sup> Beckman v. Shouse, 5 Rawle, (Penn.) R. 179.

<sup>2</sup> Brooke v. Pickwick, 4 Bing. R. 218. This rule was also recognized in Hollister v. Nowlen, 19 Wend. R. 234.

<sup>3</sup> Williams v. Great Western Railway, 28 Eng. Law & Eq. R. 440.

<sup>4</sup> Batson v. Donovan, 4 B. & Ald. 21; Gibbon v. Paynton, 4 Burr. R. 2298; 2 Kent, Comm. Lect. 40, p. 603; Story on Bailm. § 565; Titchburne v. White, 1 Str. R. 145.

<sup>5</sup> Kenrig v. Eggleston, Aleyn, R. 93. See, also, the remarks of Mr. Justice Story on this case in Story on Bailments, § 565 *a.* and of Lord Mansfield in Gibbon v. Paynton, 4 Burr. R. 2298.

be a fraud, discharging the carrier in case of loss.<sup>1</sup> And whenever the owner represents the contents of a package to be of a particular value, he can only recover a sum equal to that representation, if the package be lost.<sup>2</sup> But the owner is not bound to disclose the value of his goods; and if he be silent, and no artifice or fraud be practised, the carrier will be responsible,<sup>3</sup> even though there be a notice limiting his responsibility.<sup>4</sup> The rule in this respect is thus stated by Baron Parke:—"I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that if any thing is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly, so as to deceive him, then there is no contract between the parties; it is a fraud which vitiates the contract altogether."<sup>5</sup> But in a late case in England it is declared that a carrier has no right to insist upon knowing, in every case and under all circumstances, the contents of a package offered to him for carriage; and if he refuse to carry it merely because the consignor refuses to disclose its contents, he is liable.<sup>6</sup> At all events,

<sup>1</sup> Gibbon *v.* Paynton, 4 Burr. R. 2298. See, also, Batson *v.* Donovan, 4 Barn. & Ald. 21; Pardee *v.* Drew, 25 Wend. R. 85; Hawkins *v.* Hoffman, 6 Hill, R. 586; Orange Co. Bank *v.* Brown, 9 Wend. R. 85.

<sup>2</sup> Tylly *v.* Morrice, Carth. R. 485; Riley *v.* Horne, 5 Bing. R. 217; Batson *v.* Donovan, 4 B. & Ald. 21; 2 Kent, Comm. Lect. 40, p. 603; Story on Bailm. § 565; Laidlaw *v.* Organ, 2 Wheat. R. 178.

<sup>3</sup> Morse *v.* Slue, 1 Vent. 238; Tylly *v.* Morrice, Carth. 485; Jones on Bailm. 105; 2 Kent, Comm. Lect. 40, p. 603, 604; Story on Bailm. § 567, and cases cited.

<sup>4</sup> Brooke *v.* Pickwick, 4 Bing. 218; Garnett *v.* Willan, 5 Barn. & Ald. 53; Riley *v.* Horne, 5 Bing. 217; Story on Bailm. § 567, and cases cited.

<sup>5</sup> Walker *v.* Jackson, 10 Mees. & Welsb. 168. See, also, Orange Co. Bank *v.* Brown, 9 Wend. R. 85; Sewall *v.* Allen, 6 Wend. R. 349.

<sup>6</sup> Crouch *v.* London & North-Western Railway Co. 25 Eng. Law & Eq. R. 287. In this case Maule, J., said: "Then, with respect to the fifty-seventh

the carrier will be responsible for malfeasance, or wrong delivery, if not for negligence.<sup>1</sup> And we have already

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plea it states that the parcel was a packed parcel; that the defendants asked the plaintiffs what the contents of the parcel were; that the plaintiff then refused to tell them, and that because he did not know and could not tell them the contents of the parcel they refused to take the parcel as they lawfully might do. Now, to consider the goodness of that plea, issue being joined on it, I conceive that the allegation, that ‘because they did not know the contents of the parcel,’ is an allegation both that they did not know the contents, and that they refused to carry for the cause. They say, ‘we refused to carry the parcel because we did not know the contents, and let that be taken as the cause of our refusal.’ That is as I understand it, the plea, and it is favorable to the defendants so far. But in order to sustain this plea, as the plaintiff’s counsel has observed, we must hold, that in all cases whatever, the carrier has a right to ask the person who brings the parcel, what the contents are, and if he is not informed, that he may refuse to carry it. There is no authority to support that. There are dicta of Best, C. J., but I conceive that there is nothing amounting to an authority on the subject, and it is a proposition which is untenable in its generality or rather universality, seeing the extent to which it would necessarily lead if this plea were a good one. In order to make it a good plea, it ought to have alleged some ground why the defendants made that inquiry. If they do not suggest any, it must be considered that there is no special ground.

“Now, there is no doubt that if there is any deception, or any improper package sent by the plaintiff, the defendants are not liable for damage arising to it; but if there is any deception as to the value, the defendants are not liable. As to that, the defendants are competent to limit and they do limit by their notice, their liability with respect to certain valuable commodities; and with respect to dangerous articles, there is provision made that they may examine the parcel if they think fit, and whenever there is a good reason to suspect the contents, they may either insist on being informed of the nature of them, or, if the information is refused, they may say, ‘then we must open it ourselves’ or ‘we will not take it;’ but it cannot be maintained, that in all cases the carrier may require the person to give him a full description of every article in it. On these grounds, I think this plea, which sets out the ground of refusal, is invalid in law, and that the plaintiff is entitled to our judgment.”

<sup>1</sup> Sleat *v.* Fagg, 5 Barn. & Ad. 342; Nicolson *v.* Willan, 5 East, 507; Dwight *v.* Brewster, 1 Pick. 50; Orange County Bank *v.* Brown, 9 Wend. R. 85, 115; Batson *v.* Donovan, 5 Barn. & Ald. 21; Bignold *v.* Waterhouse, 1 M. & Selw. 261. This rule as to negligence is not, however, settled in England. See ante, § 760 *g.*

seen, that where a notice is given, limiting the responsibility of the carrier, he is bound, nevertheless, to exercise ordinary diligence;<sup>1</sup> and he is not exempted from liability for losses occasioned by a defect in the vehicle or machinery; because such a defect is a violation of his warranty.<sup>2</sup>

§ 763. Where a notice has been given, the burden of proof is in the first place on the carrier, to show that it has been actually brought home to the sender's knowledge,<sup>3</sup> and then the burden of proof changes, and is thrown upon the sender, to prove that the carrier has been guilty of negligence. And in this respect, the rule is the opposite of that applicable in ordinary cases of common carriers.<sup>4</sup>

§ 764. The carrier also has a specific lien upon the goods for his hire, and for his advances to others for freight and storage;<sup>5</sup> and, in the absence of any special contract to the contrary, cannot be compelled to surrender them until it be paid or tendered to him.<sup>6</sup> His lien is lost by abandoning his possession; and when once waived, it cannot be resumed.<sup>7</sup> Ordin-

<sup>1</sup> Wyld *v.* Pickford, 8 Mees. & Welsb. 461; Lyon *v.* Mells, 5 East, R. 428. But see *contra*, cases cited § 760 *g*, notes.

<sup>2</sup> Camden & Amboy Railroad *v.* Burke, 13 Wend. R. 611; Lyon *v.* Mells, 5 East, 428; Sharp *v.* Grey, 9 Bing. 457; Story on Bailm. § 571 *a*. But see Chippendale *v.* Lancashire & Yorkshire Railway Co. 7 Eng. Law & Eq. R. 398.

<sup>3</sup> See Crouch *v.* London and N. W. Railway, 2 C. & K. R. 789.

<sup>4</sup> Marsh *v.* Horne, 5 Barn. & Cres. R. 322; Riley *v.* Horne, 5 Bing. 217; Story on Bailm. § 410, 454, 457, 529, 574; 2 Greenleaf on Evid. § 216; Beekman *v.* Shouse, 5 Rawle, (Penn.) R. 189.

<sup>5</sup> White *v.* Vann, 6 Humphreys, R. 70.

<sup>6</sup> Skinner *v.* Upshaw, 2 Ld. Raym. 752; Sodergren *v.* Flight, cited in 6 East, R. 622; Hutton *v.* Bragg, 2 Marsh. R. 345; Stevenson *v.* Blakelock, 1 M. & S. R. 543; Chaise *v.* Westmore, 5 M. & S. R. 186; Crawshay *v.* Homfray, 4 B. & Ad. 50; Rushforth *v.* Hadfield, 6 East, R. 522; 2 Kent, Comm. Lect. 40, p. 611; Story on Bailm. § 588. See Hunt *v.* Haskell, 24 Maine R. 339; Fox *v.* McGregor, 11 Barb. 41.

<sup>7</sup> Kinloch *v.* Craig, 3 T. R. 119; Sweet *v.* Pym, 1 East, R. 4; Yates *v.* Railston, 8 Taunt. R. 293; Story on Bailm. § 568; Bailey *v.* Quint, 22 Verm. R.

narily, however, a carrier has not a lien for a general balance, on particular goods, though it seems he may acquire it by a specific notice claiming it.<sup>1</sup> Nor has he a lien for the carriage of goods wrongfully taken from the true owner by a third party, although innocently received and carried.<sup>2</sup> Nor does his lien entitle him to sell without legal proceedings.<sup>3</sup>

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474; *Forth v. Simpson*, 13 Q. B. Rep. 680. Unless by agreement, *Sawyer v. Fisher*, 32 Maine, R. 28. Or the delivery be obtained by fraud, *Bigelow v. Heaton*, 4 Denio, 496.

<sup>1</sup> *Rushforth v. Hadfield*, 6 East, R. 522; 2 Kent, Comm. 637; Angell on Carriers, § 361.

<sup>2</sup> *Robinson v. Baker*, 5 Cush. R. 137; *Fitch v. Newberry*, 1 Dougl. (Mich.) R. 1, and cases cited; *Buskirk v. Purinton*, 2 Hall, R. 561.

<sup>3</sup> *Sullivan v. Park*, 33 Maine R. 438.

## CHAPTER XI.

## CARRIERS OF PASSENGERS.

§ 765. THE rights, duties, and obligations of carriers of passengers differ from those of common carriers in some respects. Their contract is not in the nature of an insurance, like that of common carriers; but although they do not warrant the safety of passengers, at all events, they are responsible for injuries and losses arising from even the slightest negligence, and they are bound to exercise the *utmost care and diligence*.<sup>1</sup> Where an accident occurs, the *prima facie* presumption is, that it results from the negligence of the carrier, and the burden of proof is upon him to establish the contrary.<sup>2</sup> Carriers of passengers are not, however, responsible for accidents, when

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<sup>1</sup> Christie *v.* Griggs, 2 Camp. R. 79; Farish *v.* Reigle, 11 Grattan, R. 697, a very excellent case on the subject; Ingalls *v.* Bills, 9 Metcalf, R. 1; Stokes *v.* Saltonstall, 13 Peters, (U. S.) R. 181; 2 Greenleaf on Evid. § 221; Story on Bailm. § 601; Farwell *v.* Boston & Worcester Railroad Co. 4 Metcalf, R. 49. See the subject well examined in Derwort *v.* Loomer, 21 Conn. R. 246; Caldwell *v.* Murphy, 1 Duer, R. 233; Hegeman *v.* Western Railroad Co. 16 Barbour, R. 353; Laing *v.* Colder, 8 Barr, R. 479; Eldridge *v.* Long Island Railroad Co., 1 Sandf. R. 89.

<sup>2</sup> Ibid. Sharp *v.* Grey, 2 Moore & Scott, R. 620; s. c. 9 Bing. R. 460; McKinney *v.* Neil, 1 McLean, C. C. R. 540; Ingalls *v.* Bills, 9 Metcalf, R. 1; Ware *v.* Gay, 11 Pick. R. 106; Stokes *v.* Saltonstall, 13 Peters, (U. S.) R. 181; Stockton *v.* Frey, 4 Gill, R. 406; Carpue *v.* London & Brighton Railway Co. 5 Adolph. & Ell. (N. S.) R. 747; Skinner *v.* London Railway Co. 2 Eng. Law and Eq. R. 360.

the utmost care and diligence have been exercised.<sup>1</sup> But the liability of carriers of passengers is said not to be founded on the contract to carry, nor to be dependent on any compensation paid for the service, but to be a duty imposed by law from motives of public policy,—the promise to carry safely being implied from the duty, and not the duty from the promise.<sup>2</sup> Although, therefore, a passenger should be carried over a railway, gratuitously, and by invitation of the president, the company would be equally liable as if they received a compensation, for any injury resulting to him from the gross negligence of any of their servants, and, probably, even for any improper negligence.<sup>3</sup> The same rule would also apply in case of an injury to one of the hands engaged to work a steamboat or railway carriage, or in fact to any one properly in the boat or carriage, whether a pecuniary consideration were paid or not.<sup>4</sup>

§ 765 a. Where the carrier conveys passengers by the dangerous agency of steam, as on railways and by steamboats, it is said that he is bound to exert the greatest possible care and diligence not only in the management of the carriages and trains, but also in the structure and care of the track and in

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<sup>1</sup> *Christie v. Griggs*, 2 Camp. R. 79; *Stokes v. Saltonstall*, 13 Peters, R. 181; *Sharp v. Grey*, 9 Bing. R. 457; *Ware v. Gay*, 11 Pick. R. 106, 112; *Crofts v. Waterhouse*, 3 Bing. R. 319; *Aston v. Heaven*, 2 Esp. R. 533.

<sup>2</sup> See *Steamboat New World v. King*, 16 Howard, U. S. R. 469, and the editor's note to 1 American Railway Cases, p. 119, by Smith & Bates; *Collet v. The London & North Western Railway Co.* 6 Eng. Law & Eq. R. 305; *Marshall v. York, Newcastle, and Berwick Railway Co.* 7 Eng. Law and Eq. R. 519; *Gladwell v. Steggall*, 5 Bing. N. C. R. 733; *Pippin v. Shepperd*, 11 Price, R. 400. See, also, *The Great Northern Railway Co. v. Harrison*, 26 Eng. Law and Eq. R. 443, where a newspaper reporter travelling gratuitously recovered damages for an injury received on the defendants' road. See, also, *Thurman v. Wells*, 18 Barbour, R. 500. But a claim against a carrier has been held matter of contract, so far as to be discharged by a discharge under the bankrupt act of 1841; *Campbell v. Perkins*, 4 Selden, R. 430.

<sup>3</sup> See *Philadelphia, &c. Railroad v. Derby*, 14 How. (U. S.) R. 486.

<sup>4</sup> *Steamboat New World v. King et al.* 16 Howard (U. S.) R. 474.

all the subsidiary arrangements necessary to the safety of passengers;<sup>1</sup> and that any negligence in such cases may well deserve the epithet of gross.<sup>2</sup> Racing would, in itself, constitute such negligence as to render the carrier responsible in case of any injury from explosion, overturning, or collision resulting therefrom. Nor would the evidence of those engaged in racing, and who are *prima facie* liable for the consequences, be sufficient to disprove that negligence which the law presumes from the fact.<sup>3</sup> So, also, it has been held, that a railway company were responsible for an injury sustained by a passenger in their carriages, in consequence of the careless management of a switch, by which another railway connected with and entered upon their road, although the switch were provided by the proprietors of the other road, and attended by one of their servants at their expense.<sup>4</sup>

§ 765 b. Inasmuch as negligence is the foundation of responsibility in a carrier of passengers, the burden of proof is upon the passenger claiming to recover against him, to establish negligence on his part. And the mere fact of an accident and injury do not impose the burden of disproving negligence on the carrier. But the mere circumstances of the case itself may be sufficient so clearly to indicate negligence as to justify the jury in finding a verdict against the carrier, and then it would be necessary for the carrier to prove that the accident was not caused by any negligence or fault on his part or on the part of his servants. The burden of proof is in the first place on the passenger to prove negligence,

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<sup>1</sup> *McElroy v. The Nashua & Lowell R. R. Co.* 4 Cushing, R. 400; *Philadelphia & Reading Railroad Co. v. Derby*, 14 Howard, U. S. R. 486; *Steamboat New World et al. v. King*, 16 Howard, U. S. R. 474.

<sup>2</sup> *Philadelphia & Reading Railroad Co. v. Derby*, 14 Howard, U. S. R. 486. This doctrine is reaffirmed in 16 Howard, U. S. R. 474.

<sup>3</sup> *Steamboat New World v. King*, 16 Howard, U. S. R. 474.

<sup>4</sup> *McElroy v. The Nashua & Lowell Railroad Co.* 4 Cushing, R. 400.

and the carrier is only bound to rebut such presumptions of negligence as arise from the mere facts of the case.<sup>1</sup>

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<sup>1</sup> There is some apparent contradiction in the cases, but the rule stated above in the text seems to reconcile them as nearly as possible. See *Tourtellot v. Rosebrook*, 11 Metcalf, R. 460; *Holbrook v. The Utica & S. Railroad*, 2 Kernan, R. 237. In this case Ruggles, J., said: "In actions like the present, the burden of proving that the injury complained of was caused by the defendant's negligence lies on the plaintiff. The same rule applies as in an action for an injury to a passenger in a stage-coach. It generally happens, however, in cases of this nature, that the same evidence which proves the injury done, proves also the defendant's negligence; or shows circumstances from which strong presumptions of negligence arise and which cast on the defendant the burden of disproving it. For example; a passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury, testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises; not however from the fact that the leg was broken, but from the circumstances attending the fact. On the other hand, if the witness who proves the injury swears that at the moment when it happened he heard the report of a gun outside of the car, and found a bullet in the fractured limb, the presumption would be against the negligence of the carrier. It is not correct, therefore, to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to the plaintiff. The presumption arises from the cause of the injury or from other circumstances attending it, and not from the injury itself."

"The defendant contends, in the present case, that there was no circumstance attending the injury to the plaintiff from which any presumption of negligence on the part of the defendant can fairly be raised. But this proposition cannot be maintained. The boarding cars were placed on the adjoining track by the defendant, and were occupied by workmen in its service. The plaintiff's arm was broken at the moment when the passenger car in which she sat was opposite the boarding car. The long horizontal mark on the car and other circumstances show that the injury could not have been produced by a stone thrown against the car by any person outside. The object which was the immediate cause of the injury, must from the mark it left on the car have been of great strength and of considerable size. It must have been firmly fixed in its position. The shock of its first contact with the car would otherwise have thrown it off; instead of that, it remained upheld in its position until it had passed three windows of the passenger car, pro-

§ 766. Carriers of passengers are either, (1.) Carriers by land, or, (2.) Carriers by water. Carriers by land are bound

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truding to some extent into each. There was nothing except the boarding cars to which the thing which caused the injury could be attached. These circumstances are convincing proof of its connection with one of the boarding cars; they cannot be accounted for on any other hypothesis. It was the duty of the defendant and its agents to keep the narrow space between the boarding cars and the passenger train clear and free from obstruction; this was not done; and although the immediate cause of the injury cannot be ascertained, this is the misfortune of the defendant and not of the plaintiffs. The burden of showing that the injury was accidental and without fault of the defendant lies under the circumstances above stated, on it. For this purpose its local superintendent went to the boarding cars to ascertain the cause of the injury. But he does not state that he made inquiry of the people in or about those cars, or that he examined the swinging door of the storehouse car by which the accident may have been occasioned, for the purpose of ascertaining whether it bore marks of the collision. The case, therefore, was left to stand solely on the presumption that the collision took place with some object connected with the boarding cars, negligently and wrongfully placed or left by the defendant's servants in a position to cause the injury complained of. This was a strong and rational presumption, sufficient to carry to the jury, and the judge, therefore, rightly denied the motion for a nonsuit.

"The judge charged the jury, among other things, that to entitle the plaintiffs to recover, they must be satisfied from the evidence, that Mrs. Holbrook had been injured by the negligence and want of care of the defendant, its agents or servants, and that they must be satisfied from the proofs, not from speculation, that the defendant's negligence or want of care of the plaintiff contributed at all to the result, she could not recover; that the company only contracted to carry her safely when she kept in the cars; that it was for the jury to say whether her elbow was out of the cars at the time of the injury, and if it was, it was a circumstance or fact from which they might infer negligence or want of ordinary care on her part.

"The judge was then requested by the defendant's counsel to charge, as matter of law, that if they found that the plaintiff's arm or elbow was outside of the window of the car when the injury was received, it was an act of negligence, and she could not recover; but the judge refused to charge on that subject other than he had charged, to which refusal the defendant excepted.

"In this refusal to charge as requested, I was at first inclined to think there was error. But my brethren are unanimously of opinion that the judge had already charged the jury substantially in conformity with the request, and

to carry all passengers who offer themselves, provided that there be no reasonable and sufficient objection to the personal character or conduct of the passenger; and provided that there be sufficient room for his accommodation,<sup>1</sup> and upon an unconditional contract to carry, it has been lately held that they are bound to provide room for all that come.<sup>2</sup> But they are not only not bound to receive passengers who refuse to obey their reasonable regulations; or who are guilty of gross and vulgar habits, by which the other passengers are annoyed; or who create disturbances; or whose characters are unquestionably bad, or even suspicious; but it is their duty not to receive them, and the other passengers may insist upon this duty. So, also, they may exclude all persons whose object is to interfere with the interest and patronage of the proprietors, so as to make their business less lucrative.<sup>3</sup> And where a

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that he was right, therefore, in declining to repeat what he had before stated. I yield to their judgment on this point, and concur in affirming the judgment." See, also, *Skinner v. London, &c. Railway*, 2 Eng. Law & Eq. R. 360; *Laing v. Colder*, 8 Barr, R. 479; *Stokes v. Saltonstall*, 13 Peters, R. 181; *Ware v. Gay*, 11 Pick. R. 106; *Carpue v. London & Brighton Railway Co.* 5 Adolph. & Ell. 747; *Hegeman v. Western Railroad Co.* 16 Barb. R. 353; *Stockton v. Frey*, 4 Gill, R. 407; *Farish v. Reigle*, 11 Gratt. R. 697.

<sup>1</sup> *Jencks v. Coleman*, 2 Sumner, R. 221, 224; *Story on Bailm.* § 591; *Pickford v. Grand Junction Railway Co.* 8 Mees. & Welsb. 372; *Jackson v. Rogers*, 2 Show. R. 328. See *Bennett v. The Steamboat Co.* 6 Com. B. Rep. 775.

<sup>2</sup> *Hawcroft v. The Great Northern Railway*, 8 Eng. Law & Eq. R. 362.

<sup>3</sup> *Jencks v. Coleman*, 2 Sumner, R. 225; *Commonwealth v. Power*, 7 Metcalf, R. 596. See, also, ante, *Innkeepers*, § 44; *Loring v. Aborn*, Court of Common Pleas, Essex county, Massachusetts, January, 1849, cited in *Angell on Carriers*, § 590, note. It has been said in *Coppin v. Braithwaite*, 8 Jurist, 875, that where a passenger who had paid his fare turned out to be a pickpocket, the carrier could not turn him out, as long as he committed no impropriety. This doctrine certainly is very extraordinary, for, on general principles, it would seem that the carrier, upon tender of the fare to the passenger, would not only have such right, but it would become his duty to the passengers to exercise it. And in case he allowed the pickpocket to remain after knowledge of his character, thus exposing the passengers to the danger of theft, he would be guilty not simply of negligence, but of gross misconduct, nay, even of confederacy. If this rule be correct, it affords to the carrier the

passenger went on board of a steamer to solicit patronage for his line of coaches, which was running in opposition to the line established by the proprietors of the steamer and forming a part of its business, and so interfering with the very objects of the company; it was held that they were not bound to admit him.<sup>1</sup> But a proprietor of a coach has no right to exclude passengers, by making a *private* agreement with the proprie-

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most ample means of confederating with pickpockets to steal the property on the persons of the passengers, for which he is not responsible. See *Jencks v. Coleman*, 2 Sumner, R. 225, where the very case is put.

<sup>1</sup> *Jencks v. Coleman*, 2 Sumner, R. 225. In this case, the law on this point is clearly laid down. Mr. Justice Story says,—“There is no doubt, that this steamboat is a common carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question, then, really resolves itself into the mere consideration, whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers and for the due arrangements of their business. The proprietors have not only this right, but the further right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and, *a fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board, whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them.

“While, therefore, I agree, that steamboat proprietors, holding themselves out as common carriers, are bound to receive passengers on board under ordinary circumstances, I at the same time insist, that they may refuse to receive them, if there be a reasonable objection. And as passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under ordinary circumstances, impliedly contracts to obey such regulations; and may justly be refused a passage, if he wilfully resists or violates them.

“Now, what are the circumstances of the present case? Jencks (the VOL II.—CONT.

tors of another coach, that they will receive no passengers unless they come by such second coach.<sup>1</sup> So, also, it has been

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plaintiff) was, at the time, the known agent of the Tremont line of stage-coaches. The proprietors of the Benjamin Franklin had, as he well knew, entered into a contract with the owners of another line (the Citizens' Stage-Coch Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connection with and to meet the steamboats plying between New York and Providence, and belonging to the proprietors of the Franklin. Such a contract was important, if not indispensable, to secure uniformity, punctuality, and certainty in the carriage of passengers on both routes; and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence, and going therein to Newport; and commonly of coming on board at Newport, and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors. He had the fullest notice, that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board, as in the declaration mentioned, there was every reason to presume that he was on board for his ordinary purposes as agent. It has been said, that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think, that the proprietors had a right to inquire into such intent and motives; and to act upon the reasonable presumptions which arose in regard to them. Suppose a known or suspected thief were to come on board; would they not have a right to refuse him a passage? Might they not justly act upon the presumption that his object was unlawful? Suppose a person were to come on board, who was habitually drunk, and gross in his behavior, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be.

"It has been said by the learned counsel for the plaintiff, that Jencks was going from Providence to Newport, and not coming back; and that, in going down, there would, from the very nature of the object, be no solicitation of passengers. That does not necessarily follow; for he might be engaged in making preliminary engagements for the return of some of them back again. But, supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think that the proprietors of the steamboats were not bound to take a passenger from Providence to Newport,

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<sup>1</sup> *Bennett v. Dutton*, 10 N. Hamp. R. 481.

held, that where the proprietors of a railway receive their passengers, and commence their carriage at the station of another

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whose object was, as a stationed agent of the Tremont line, thereby to acquire facilities to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry, whose object it is to commit a trespass upon his lands? A case, still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup at his house; and an agent is employed by a rival house, at the distance of a few miles, to decoy the passengers away, the moment they arrive at the inn; is the innkeeper bound to entertain and lodge such agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not.

"It has been also said, that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose; and especially if it will facilitate the transportation of passengers, and increase the patronage of their steamboats. I do not say that they have a right to act oppressively in such cases. But, certainly, they may in good faith make such contracts, to promote their own as well as the public interests.

"The only real question, then, in the present case, is, whether the conduct of the steamboat proprietors has been reasonable and *bonâ fide*. They have entered into a contract, with the Citizens' line of coaches, to carry all their passengers to and from Boston. Is this contract reasonable in itself, and not designed to create an oppressive and mischievous monopoly? There is no pretence to say, that any passenger in the steamboat is bound to go to or from Boston in the Citizens' line. He may act as he pleases. It has been said by the learned counsel for the plaintiff, that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here, whether the contract with the Citizens' line was indispensable, or absolutely necessary, in order to insure the carriage of the passengers to and from Boston. But the true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself, and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise, to be for the plaintiff."

road, they are bound to have a servant there to take charge of the luggage, until it is placed in their carriages.<sup>1</sup>

§ 766 a. The passenger, on his part, is bound to conform to all the reasonable regulations adopted by the carrier;<sup>2</sup> and a passage may be refused to him, if he wilfully resist or violate them.<sup>3</sup> Where a person takes a place in a stage-coach, and advances only a portion of the fare, the coach-driver may, if the passenger do not present himself at the time and place when and where the coach sets out, (unless some other time and place be appointed,) fill up his place with another passenger; but if the passenger advance the whole fare, he may claim his seat at any stage of the journey.<sup>4</sup> If a passenger carrier agree to transport a person from A. to B. by a particular vessel, which, unknown to either party, is a total wreck, and so performance becomes impossible, the carrier must restore the passage money and interest.<sup>5</sup>

§ 767. Carriers of passengers are also bound to provide suitable vehicles and harnesses, and necessary equipments, to insure the safety of the passengers; or they will be liable for any injuries arising from a deficiency therein, or for injuries arising from a malconstruction.<sup>6</sup> Where, therefore, in consequence of the want of a railing shutting the luggage off, it struck against a passenger and threw her off the coach, the carrier was held to be liable.<sup>7</sup> They are also bound to know

<sup>1</sup> *Jordan v. The Fall River Railroad*, 5 Cushing, R. 69.

<sup>2</sup> *Galena Railroad v. Yarwood*, 15 Illinois R. 472.

<sup>3</sup> *Jencks v. Coleman*, 2 Sumner, R. 221, 224; *Story on Bailm.* § 591; *Pickford v. Grand Junction Railway Co.* 8 Mees. & Welsb. 372; *Jackson v. Rogers*, 2 Show. R. 328.

<sup>4</sup> *Ker v. Mountain*, 1 Esp. R. 27, per Lord Ellenborough.

<sup>5</sup> *Briggs v. Vanderbilt*, 19 Barb. R. 222.

<sup>6</sup> *N. J. Railroad v. Kennard*, 21 Penn. St. R. 203; *Farish v. Reigle*, 11 Grattan, R. 697; *Derwort v. Loomer*, 21 Conn. R. 246; *N. & C. Railroad v. Messind, Sneed*, R. 221.

<sup>7</sup> *Curtis v. Drinkwater*, 2 Barn. & Ad. 169.

thoroughly the condition of their vehicles and equipments; and if an accident occur, because of any defect, they are responsible.<sup>1</sup> And the burden is on them to prove that the accident was not owing to their want of care.<sup>2</sup> Nor does it matter that the defect is out-of sight, and latent, provided that it could have been discovered by a minute examination,<sup>3</sup> for every coach proprietor is understood to "warrant to the public, that his coach is equal to the journey it undertakes, and it is his duty to examine it previous to the commencement of every journey."<sup>4</sup> It has been said, that a coach should be road-worthy, in like manner as a ship should be sea-worthy;<sup>5</sup> but this would only be true in respect to goods and luggage—not to passengers—for the liability of a carrier of passengers is not that of a common carrier of goods, and he is responsible only for want of proper diligence.<sup>6</sup> In a late case in Massachusetts, the measure of liability assumed by a carrier of passengers in respect to the condition of his vehicle was fully considered; and the result to which the court arrived, after an examination of all the principal English and American cases, was this: "That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coach-

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<sup>1</sup> *Camden & Amboy Railroad Co. v. Burke*, 13 Wend. R. 611; *Hollister v. Nowlen*, 19 Wend. R. 234; *Christie v. Griggs*, 2 Camp. R. 79; *Carroll v. N. Y. & N. H. Railroad*, 1 Duer, R. 571.

<sup>2</sup> *Holbrook v. Utica, &c. Railroad Co.* 16 Barb. R. 113; *McKinney v. Niel, 1 McLean*, R. 540.

<sup>3</sup> *Israel v. Clark*, 4 Esp. R. 259; *Sharp v. Grey*, 9 Bing. R. 457; *Christie v. Griggs*, 2 Camp. R. 80; *Bremner v. Williams*, 1 Car. & Payne, R. 414; *Crofts v. Waterhouse*, 3 Bing. R. 319; *Jones v. Boyce*, 1 Stark. R. 493; 1 Bell, Comm. 462.

<sup>4</sup> Per Mr. Chief Justice Best, in *Bremner v. Williams*, 1 Car. & Payne, R. 414. See, also, *Ware v. Gay*, 11 Pick. R. 106; *Ingalls v. Bills*, 9 Metcalf, R. 1.

<sup>5</sup> *Sharp v. Grey*, 9 Bing. R. 457, per Mr. Justice Bosanquet.

<sup>6</sup> *Ingalls v. Bills*, 9 Metcalf, R. 12; *Camden & Amboy Railroad Co. v. Burke*, 13 Wend. R. 626; *Hollister v. Nowlen*, 19 Wend. R. 236; *Story on Bailm.* § 592-600.

men, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompence.”<sup>1</sup>

§ 767 *a.* So, also, carriers of passengers are bound to provide careful and skilful drivers, and steady and suitable horses; not to overload the coach; to receive the usual baggage and luggage, and to redeliver it at the end of the journey. If a coach-driver overload his coach,<sup>2</sup> or take more than the legal number, a passenger may refuse to take his seat, and may sue for expenses incurred in procuring another conveyance.<sup>3</sup> And if a passenger book for four seats together in the inside, the coach-driver is bound to furnish them, or he will in like manner be liable.<sup>4</sup> And it seems to be no excuse for a railway company, that there is no room for a passenger in the train. The carrier is bound to provide room, unless his contract is made condi-

<sup>1</sup> Ingalls *v.* Bills, 9 Metcalf, R. 1, 15. The reader is referred to this case for an able review of the principal cases on this subject. See, also, Hegeman *v.* Western Railroad Co. 16 Barb. R. 353; Caldwell *v.* Murphy, 1 Duer, R. 233.

<sup>2</sup> Derwort *v.* Loomer, 21 Conn. R. 246, and it is no excuse for the overloading of the coach that the carrier is accustomed habitually to do so.

<sup>3</sup> Long *v.* Horne, 1 Car. & Payne, 610.

<sup>4</sup> Ibid.

tional upon there being room.<sup>1</sup> They are also bound to stop at the usual places; to remain there during the usual intervals for meals; and to take all precautions necessary to insure the safety of the passengers on the road.<sup>2</sup> So, also, the proprietors of a stage-coach are responsible for the acts of the driver, who is their agent, and is bound to exert fully competent skill.<sup>3</sup> If injury result from his carelessness or unskilfulness, they are bound to indemnify the party injured, in damages. Thus, if he drive with his reins so loose that he cannot manage his horses;<sup>4</sup> or if he drive wilfully into dangerous places, and do not take the safest course;<sup>5</sup> or if he drive furiously, or race with other vehicles;<sup>6</sup> or excite vicious or unbroken horses, so that they cannot be stopped or properly directed;<sup>7</sup> or if, through intoxication, he cannot guide his horses;<sup>8</sup> and even if, in consequence of his imprudence or unskilfulness, the lives of the passengers be endangered, and any one, through *reasonable* fear, leap from the coach, and injure himself thereby, the proprietors are liable.<sup>9</sup> So, also, the coachman is bound to give

<sup>1</sup> Hawcroft *v.* The Great Northern Railway Co. 8 Eng. Law & Eq. R. 362.

<sup>2</sup> Crofts *v.* Waterhouse, per Best, C. J., 3 Bing. R. 319; Long *v.* Horne, 1 Car. & Payne, R. 612; Israel *v.* Clarke, 4 Esp. R. 259; Aston *v.* Heaven, 2 Esp. R. 533; Heard *v.* Mountain, 5 Petersdorf, Abr. Carriers, p. 54; Robinson *v.* Dunmore, 2 B. & P. R. 419.

<sup>3</sup> Peck *v.* Neil, 3 McLean, C. C. R. 22; Crofts *v.* Waterhouse, 3 Bing. R. 321. See McElroy *v.* Nashua, &c. Railroad, 4 Cush. R. 400.

<sup>4</sup> Aston *v.* Heaven, 2 Esp. R. 533. See, also, McKinney *v.* Niel, 1 McLean, C. C. R. 540; Cotterill *v.* Starkey, 8 Car. & Payne, R. 691.

<sup>5</sup> Jackson *v.* Tollett, 2 Starkie, R. 37; Mayhew *v.* Boyce, 1 Starkie, R. 423; McKinney *v.* Niel, 1 McLean, C. C. R. 540.

<sup>6</sup> Stokes *v.* Saltqnstall, 13 Peters, (U. S.) R. 121; Gough *v.* Bryan, 5 Dowl. P. C. R. 765; McKinney *v.* Niel, 1 McLean, C. C. R. 540; 8 Car. & Payne, note, p. 694; Monroe *v.* Leach, 7 Metcalf, R. 274.

<sup>7</sup> Per Best, C. J., in a charge to the Wilts Grand-Jury, cited in 8 Car. & Payne, note, 694; Monroe *v.* Leach, 7 Metcalf, R. 274; Churchill *v.* Rosebeck, 15 Conn. R. 359. See, also, as to improper speed on a railway, Carpe *v.* Brighton & London Railway, 5 Adolph. & Ell. R. (n. s.) 747; Farwell *v.* Boston & Worcester Railroad Co. 4 Metcalf, R. 49; Steamboat New World *v.* King, 16 Howard, U. S. R. 474.

<sup>8</sup> Stokes *v.* Saltonstall, 13 Peters, (U. S.) R. 181.

<sup>9</sup> Jones *v.* Boyce, 1 Stark. R. 493; Stokes *v.* Saltonstall, 13 Peters, R. 181;

notice of danger in any part of the road; and to observe the usage of the road in passing other vehicles;<sup>1</sup> and if persons be crossing the highways on foot, he is bound to exercise the greatest diligence to avoid driving against them; or he will be responsible for the consequences.<sup>2</sup> For, as it has been said, "a man has a right to walk in the road if he pleases. It is a way for footpassengers as well as carriages."<sup>3</sup> So, also, the passengers must be carried to the end of the journey, and put down at the usual stopping-place, or at any particular stopping-place, if it be either agreed upon specially, or if it be the usage to leave the passengers where they wish.<sup>4</sup> And if the contract be to put down a passenger at a particular place, the danger of so doing is no excuse for not doing so.<sup>5</sup> Nor is the duty of carriers in this respect diminished by any accident occurring to the vehicle or horses; for their undertaking is absolute, and they must, therefore, provide another conveyance or other horses, in case accident happens to their own.<sup>6</sup> The carrier is also bound to make a proper delivery of the luggage at the end of his journey,—if the passage money be paid,<sup>7</sup>—but he

Story on Bailm. § 598, and cases cited there and in previous notes; Jackson *v.* Tollett, 2 Stark. R. 37; Ingalls *v.* Bills, 9 Metcalf, R. 1; Eldridge *v.* Long Island Railroad Co. 1 Sandf. R. 89; McKinney *v.* Niel, 1 McLean, R. 540; Galena Railroad *v.* Yarwood, 15 Illinois R. 471.

<sup>1</sup> Dudley *v.* Smith, 1 Camp. R. 167.

<sup>2</sup> Cotterill *v.* Starkey, 8 Car. & Payne, R. 691; Boss *v.* Litton, 5 Car. & Payne, R. 407; Wakeman *v.* Robinson, 1 Bing. R. 213.

<sup>3</sup> Lord Denman, in Boss *v.* Litton, 5 Car. & Payne, R. 407. Upon this point, see, also, Hawkins *v.* Cooper, 8 Car. & Payne, R. 475; Woolf *v.* Beard, 8 Car. & Payne, R. 373; Wynn *v.* Allard, 5 Watts & Serg. R. 524.

<sup>4</sup> Dudley *v.* Smith, 1 Camp. R. 167; Ker *v.* Mountain, 1 Esp. R. 27; Story on Bailm. § 600.

<sup>5</sup> Porter *v.* Steamboat New England, 17 Missouri R. 290.

<sup>6</sup> Jeremy on Carriers, 23; Angell on Carriers, § 531; Ker *v.* Mountain, 1 Esp. R. 27; Massiter *v.* Cooper, 4 Esp. R. 260.

<sup>7</sup> Richards *v.* London, Brighton, &c. Railway, 7 Com. B. R. 839; Butcher *v.* The London & South-Western Railway Co. 29 Eng. Law & Eq. R. 347. In this case the plaintiff was a passenger by railway from F. to W., bringing with him as luggage a small carpet-bag, which was placed in the carriage he

has a lien upon the luggage, though not upon the person of the passenger.<sup>1</sup> Their liability, as common carriers, as to the luggage, expires, if it be not demanded within a reasonable time, and they become mere bailors for hire.<sup>2</sup>

§ 767 b. There are certain rules of the road, which have by long custom become a kind of law, which should here be adverted to. First, the rule in England is that all carriages meeting shall pass each other on the left.<sup>3</sup> In America the rule is that they shall pass on the right. Second, where one carriage overtakes another, the foremost carriage bearing to the left, the other shall pass on the off side. Third, in crossing, the coachman must bear to the left hand and pass behind the other carriage.<sup>4</sup> But these rules are not very strictly enforced, and when the road is broad, he may often pass on the near side.<sup>5</sup> Deviations from the rule are not only often justifiable,

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rode in. On the arrival of the train at W. station, the plaintiff got out upon the platform, with the bag in his hand, and it was taken from him by a railway porter to be placed in one of the cabs which were standing in the station. In an action against the railway company for the loss of the bag, it was proved that the plaintiff never saw the bag again after the porter had so taken it from him, and that the porter was unable to find it. It was also proved to be the practice of the railway company for their porters to assist in carrying the passengers' luggage, on the arrival of a train, to the cabs in the station. *Held*, that there was evidence of the railway company having contracted to deliver the plaintiff's bag to a cab in the station, and of their not having performed such contract. *Held, also*, that whether the plaintiff had accepted a delivery of the bag on the platform, or elsewhere, in lieu of such delivery to a cab, was a question of fact for a jury to determine.

<sup>1</sup> Wolfe *v.* Summers, 2 Camp. R. 631.

<sup>2</sup> Powell *v.* Myers, 26 Wend. R. 591; Camden & Amboy Railroad *v.* Belknap, 21 Wend. R. 354.

<sup>3</sup> According to the old English rhyme:—

"The law of the road is a paradox quite  
As you journey the highway along,—  
If you keep to the left, you are sure to go right,  
But if you go right, you go wrong."

<sup>4</sup> Story on Bailm. § 599; 5 Petersdorf, Abr. Carriers, p. 55, note; Wayde *v.* Carr, 2 Dowl & Ryl. R. 255.

<sup>5</sup> Ibid. Wordsworth *v.* Willan, 5 Esp. R. 273.

but sometimes even necessary and incumbent on the driver, as for instance where he sees a horse coming furiously along on the wrong side, and unmanageable.<sup>1</sup> So, also, where the street is very broad, the driver may ordinarily drive on the wrong side, provided he leave sufficient room for the other to pass on the proper side;<sup>2</sup> and if no carriage be on the road, he may drive on either side he chooses.<sup>3</sup> The sole effect of a violation of these rules seems to be, that it affords a presumption of negligence against the party violating them. But he may repel such presumption by proof of proper skill and care; and whether he was on the right or wrong side, he will only be liable where the circumstances indicate improper negligence on his part;<sup>4</sup> and where it appears that both parties were in fault, no recovery can take place.<sup>5</sup>

§ 768. With regard to baggage and luggage, carriers of passengers have the liabilities of common carriers.<sup>6</sup> But if a passenger do not surrender his luggage to the carrier, but take it into his own charge, the carrier has been held, in this country, not to be liable in case of its loss.<sup>7</sup> But in England it

<sup>1</sup> *Turley v. Thomas*, 8 Car. & Pay. R. 103.

<sup>2</sup> *Wordsworth v. Willan*, 5 Esp. R. 173; *Mahew v. Boyce*, 1 Stark. R. 423.

<sup>3</sup> *Aston v. Heaven*, 2 Esp. R. 533.

<sup>4</sup> *Crofts v. Waterhouse*, 3 Bing. R. 321; *Chaplin v. Hawes*, 3 Car. & Payne, R. 554; *Mahew v. Boyce*, 1 Starkie, R. 423; *Munroe v. Leach*, 7 Metcalf, R. 274.

<sup>5</sup> *Butterfield v. Forrester*, 11 East, R. 60; *Bridge v. Grand Junction Railway Co.* 3 Mees. & Welsb. 244; *Smith v. Smith*, 2 Pick. R. 621; *Brownell v. Flagler*, 5 Hill, R. 282; *Lane v. Crombie*, 12 Pick. R. 177; *Noyes v. Morris*, 1 Verm. R. 353; *Burkley v. N. York Dry Dock Co.* 2 Hall, R. 151.

<sup>6</sup> *Palmer v. Grand Junction Railway Co.* 4 Mees. & Welsb. R. 749; *Pickford v. Grand Junction Railway Co.* 8 Mees. & Welsb. R. 372; *Gisbourne v. Hurst*, 1 Salk. R. 249; *Cairns v. Robins*, 8 Mees. & Welsb. R. 258; *Brook v. Pickwick*, 4 Bing. R. 218; *Jones v. Voorhees*, 10 Ohio R. 145; *Powell v. Meyers*, 26 Wend. R. 591; *Hollister v. Nowlen*, 19 Wend. R. 234; *Cole v. Goodwin*, 19 Wend. R. 251; *Orange County Bank v. Brown*, 9 Wend. R. 85.

<sup>7</sup> *Tower v. Utica & Schenectady Railroad Co.* 7 Hill, R. 47; *Cohen v. Hume*, 1 McCord, S. C. R. 439.

has been decided that if a traveller take into the stage-coach or railway carriage his portmanteau, the carrier is not absolved from responsibility, but will be liable if it be lost.<sup>1</sup> Yet if the thing be tendered to the carrier for conveyance, and he direct the passenger to place it in any part of the vehicle, he will be responsible for its safety. Nor is it necessary that the luggage of the passenger should be booked or entered on the way-bill, or even labelled and directed, unless he be specially required to do so.<sup>2</sup> Where a person proposes only to carry passengers, and not goods, and receives pay only for the former, he is not a common carrier of the goods, but only a gratuitous bailee.<sup>3</sup>

§ 768 a. The term luggage or baggage for which a common carrier is responsible is restricted to articles carried for the personal use and convenience of the traveller, and does not include merchandise or other articles carried for other purposes, as for sale. Yet it has been said, that although carriers of passengers are not ordinarily liable for merchandise when packed up with a traveller's luggage;<sup>4</sup> yet if the merchandise

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<sup>1</sup> *Robinson v. Dunmore*, 2 Bos. & Pul. R. 419; *Richards v. The London, Brighton, and South Coast Railway Co.* 7 C. B. 839; *Butcher v. The London and South-Western Railway Co.* 29 Eng. Law & Eq. R. 348. But see contra, *Boys v. Pink*, 8 Car. & Payne, R. 361; *Syms v. Chaplin*, 5 Adolph. & Ell. 634.

<sup>2</sup> *Upshare v. Aidee*, 1 Com. R. 24; *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, R. 17.

<sup>3</sup> *Cole v. Goodwin*, 19 Wend. R. 251; *Peixotti v. M'Laughlin*, 1 Strob. S. C. R. 468.

<sup>4</sup> *Hawkins v. Hoffman*, 6 Hill, R. 586; *Dibble v. Brown*, 12 Georgia R. 217. In this case Nesbit, J., said: "It remains, however, to inquire what is to be understood by baggage, for which they are thus liable? And we are not guided, in this inquiry, by adjudications which settle a definite rule of universal application. From their usual course of business, when they carry a passenger, a contract is implied to carry also his baggage. They are presumed to be compensated in the fare for his transportation, and I can very well believe, well compensated, because the amount of travel is greatly increased by the comfort and convenience of carrying baggage, and would be lessened, if for his baggage, a passenger was required to pay freight. It is curious to remark

be so packed as to be obviously merchandise, so that any one

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as I do, *en passant*, that the law takes more care of a man's luggage than it does of his life and limbs; for the former, the carrier is liable as insurer against loss, except by the act of God and the public enemies; for the safety of the latter, he is bound only to extraordinary care and diligence. But to return; to what articles under the denomination of baggage, does this implied contract extend?

"Judge Story informs us that 'by baggage, we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale and the like,' Story on Bailm. § 499. In Orange County Bank *v.* Brown, Judge Nelson says, 'a reasonable amount of baggage, by custom or the courtesy of the carrier, is considered as included in the fare for the person; but courts ought not to permit this gratuity or custom to be abused, and under pretence of baggage, to include articles not within the sense or meaning of the term, or within the object or intent of the indulgence of the carrier, and thereby defraud him of his just compensation and subject him to unknown and illimitable hazards.' 9 Wend. 115, 116. In Hawkins *v.* Hoffman, Brouson, J., says, 'An agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be extended a single step beyond such things as the traveller usually has with him as part of his luggage. It is doubtless difficult to define with accuracy what shall be deemed baggage, within the rule of the carrier's liability. I do not intend to say, that the articles must be such as every man deems essential to his comfort; for some men may carry nothing, or very little with them, when they travel, whilst others consult their convenience by carrying many things. Nor do I mean to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement, by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such. This is, I think, a good test for determining what things fall within the rule.' 6 Hill, N. Y. R. 589, 590.

"It has been decided that under the term baggage, merchandise, as silks or other fine articles, are not embraced, (25 Wend. 458); nor large sums of money, (9 Wend. 85); nor samples of merchandise, (6 Hill, N. R. 586). A watch is embraced, according to the Ohio courts. 10 Ohio R. 145. So far as these rulings go, the doctrine may be considered as settled, and it must be considered as settled in all cases falling within the reason of those rulings. When, however, all this is done, the subject is disengaged of but little of

looking at it would perceive it to be so, the carrier would be liable if he received it without objection.<sup>1</sup>

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the difficulty which environs it. Nor does the test of Story, or the opinions of Judges Nelson and Bronson relieve it of embarrassment. When we settle down with Judge Story upon the proposition that, by *baggage*, is to be understood 'such articles of necessity or personal convenience as are usually carried by passengers, for their personal use,' we are still without a rule for determining what articles are included in *baggage*. For such things as would be necessary to one man, would not be necessary to another; articles which would be held but ordinary conveniences by A. might be considered incumbrances by B. One man, from choice or habit, or from educational incapacity to appreciate the comforts or conveniences of life, needs, perhaps, a portmanteau, a change of linen, and an indifferent razor; whilst another, from habit, position, and education, is unhappy without all the appliances of comfort which surround him at home. The quantity and character of *baggage* must depend very much upon the condition in life of the traveller — his calling, his habits, his tastes, the length or shortness of his journey, and whether he travels alone, or with a family. If we argue further with Judge Story, and say that the articles of necessity or of convenience must be such as are *usually* carried by travellers for their personal use, we are still at fault, because there is in no State of this Union, nor in any part of any one State, any settled usage, as to the *baggage* which travellers carry with them for their personal use. The quantity and character of *baggage* found to accompany passengers, are as various as are the countenances of the travellers. The negative part of Judge Story's definition, with more precision, furnishes a rule *pro tanto*. *Baggage*, he says, does not embrace merchandise, or other valuables not designed for personal use, but which are designed for other purposes, such as a sale or the like. We may safely say, that it does not embrace merchandise or other articles which are intended to be sold. But it is not to be understood, I apprehend, that no article is embraced which may be classed with merchandise or which is valuable, other than such as is usual for personal use. Regard must be had to the quantity and value of the articles. A trunk of laces, for instance, although light and small in bulk, clearly is excluded. Their value would exclude them. The risk imposed upon the carrier is not that contemplated in the implied contract to carry *baggage*, and to be responsible for it. The liability, in such a case, would be wholly disproportioned to the compensation which he is presumed to derive from the fare of passengers. Besides, it is a fraud to subject him to so great a hazard, without warning him of its existence."

<sup>1</sup> *The Great Northern Railway Co. v. Shepherd*, 9 Eng. Law & Eq. R. 477. And see, also, 14 Ibid. 369; 8 Excheq. R. 30.

768 b. The following articles have been held baggage within the rule of a carrier's liability:— apparel and jewelry for personal ornament;<sup>1</sup> a watch;<sup>2</sup> tools of a mechanic to the value of fifty-five dollars;<sup>3</sup> a pocket-pistol carried in the trunk;<sup>4</sup> and

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<sup>1</sup> McGill *v.* Rowand, 3 Barr, R. 451; Brooke *v.* Pickwick, 4 Bing. R. 218.

<sup>2</sup> Jones *v.* Voorhees, 10 Ohio R. 145. But see Bomar *v.* Maxwell, 9 Humph. R. 621.

<sup>3</sup> Porter *v.* Hildebrand, 14 Penn. St. R. 129.

<sup>4</sup> Woods *v.* Devin, 13 Ill. R. 746. Treat, C. J., said in this case:—"In the present case, the defendant was a common carrier of passengers. The plaintiff engaged a passage to La Salle, and sent his baggage to the boat. The moment it was received on board, the defendant became responsible for its safe delivery at the port of destination, loss occasioned by inevitable accident or the public enemies only excepted. The carpet-bag was stolen from the boat and never recovered by the plaintiff. Loss by theft is not within either of the exceptions to the risk of a common carrier. The defendant is therefore chargeable with the value of the articles in the carpet-bag, unless they are not to be regarded as forming a part of the baggage of a traveller. It is conceded that the articles of wearing apparel were properly baggage; and the only question is in respect to the pistols. What constitutes the baggage of a traveller, for the loss of which a common carrier is liable, is a question of some practical importance, and one that has been much considered in reported cases. It is argued in all the cases that the term *baggage* includes the wearing apparel of the traveller. In the Orange County Bank *v.* Brown, *supra*, the trunk of a passenger containing \$11,250 in money belonging to the bank was lost; and the bank sought to recover the amount of the carrier, on the ground that it was part of the baggage of the passenger. But the court decided that the money did not fall within the term *baggage*; and that the attempt to carry it free of reward under cover of *baggage* was an imposition on the carrier. In Pardee *v.* Drew, 25 Wend. R. 457, where a trunk containing valuable merchandise, and nothing else, was taken on board of a boat by a passenger, and deposited with the ordinary baggage, it was held that the carrier was not chargeable for its loss. In Hawkins *v.* Hoffman, *supra*, it was decided that the term 'baggage,' did not embrace samples of merchandise carried by a passenger in his trunk for the purpose of enabling him to make bargains for the sale of goods. In Cole *v.* Goodwin, 19 Wend. R. 251, and Weed *v.* The Saratoga and Schenectady Railroad Company, Ib. 534, the court held that a carrier was liable for money in the trunk of a passenger not exceeding a reasonable amount for travelling expenses. In Jones *v.* Voorhees, 10 Ohio, R. 145, a carrier was made liable for the value of a gold watch lost from the trunk of a passenger. In McGill *v.* Rowand, 3 Barr, R. 451,

other articles necessary for the personal convenience of the passenger,<sup>1</sup> and money necessary for travelling expenses and personal use, to a reasonable amount;<sup>2</sup> but not large sums of

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the husband was permitted to recover of the carrier the value of his wife's jewelry which had been taken from her trunk on the coach in which she was a passenger. In *Porter v. Hildebrand*, 14 Penn. St. R. 129, the court held that a carpenter might recover from a carrier the value of tools contained with clothing in his trunk, which the carrier had lost, the jury having found that they were the reasonable tools of a carpenter.

"The principle of the authorities is, that the term 'baggage' includes a reasonable amount of money in the trunk of a passenger intended for travelling expenses, and such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement, or protection; and it does not extend to money, merchandise, or other valuables, although carried in the trunks of passengers, which are designed for different purposes. And regard may with propriety be had to the object and length of the journey, the expenses attending it, and the habits and condition in life of the passenger. A more definite rule cannot well be laid down. The remarks of Bronson, J., in *Hawkins v. Hoffman*, *supra*, are pertinent. He says, 'It is undoubtedly difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for instruction or his amusement by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term "baggage," because they are usually carried as such.'

"We think the articles in question formed a part of the baggage of the plaintiff, and as such come within the risk of the carrier. They were not carried for purposes of sale or traffic, but for the personal use and protection of the passenger; and it is not unusual for such articles to be carried in the trunks of travellers."

<sup>1</sup> *Bomar v. Maxwell*, 9 Humphreys, R. 621.

<sup>2</sup> *Jordan v. The Fall River Railroad Co.* 5 Cush. R. 69. In this case Fletcher, J., said, "The only question of importance raised in the case is, whether or not the plaintiff can recover for the money contained in the trunk, as properly constituting a part of her baggage as passenger. It was held, in the time of Lord Holt, and formerly by the supreme court of New York, that passenger carriers were not liable for baggage, unless a particular and distinct

money taken not for use on the journey, but for the purpose of transportation;<sup>1</sup> nor a trunk of silk goods, carried as merchandise;<sup>2</sup> nor samples used to effect sales.<sup>3</sup>

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price had been paid for its conveyance. But it is now well settled, and is a matter of great and general convenience and accommodation, in this age of universal and perpetual travelling, that passenger carriers are responsible for the baggage of a passenger, and that the reward for conveying the baggage is included in the passenger's fare. But, though it is settled that passenger carriers are responsible for baggage, yet there is still a very wide field for controversy remaining, in determining what is properly included in the term baggage. From the nature of the case, it is impracticable to prescribe an exact rule, or to define with technical precision what may properly be included in the term baggage, as used in connection with travelling in public conveyances.

" Some persons, and in this particular, the wisest, perhaps, take little or nothing with them in travelling, while others take many things and large quantities. It is quite impossible for the court to restrict, within certain and prescribed limits, the quantity or value, or kind of articles, which may be embraced in the term baggage of the travelling world. The most that can be done is, to prescribe some general rules as to the character, description, and purposes of articles which may be taken as baggage. It may be said, in general terms, that the baggage includes such articles as are of necessity or convenience for personal use, and such as it is usual for persons travelling to take with them. It has been said, that articles for instruction, or amusement, as books, or a gun, or fishing-tackle, fall within the term baggage. In the case of *Brooke v. Pickwick*, 4 Bing. R. 218, the carrier was held responsible for a ladies' trunk, containing apparel and jewels. So, in the case of *McGill v. Rowand*, 3 Barr, 451, which was for apparel and jewelry. In *Jones v. Voorhees*, 10 Ohio R. 145, 150, the carrier was held responsible for a watch which was lost in a trunk, as being an appendage of the traveller. But a carrier is not liable for merchandise as baggage. In *Pardec v. Drew*, 25 Wend. R. 459, the passenger carrier was held not responsible for a trunk of silk goods as baggage. So, in *Hawkins v. Hoffman*, 6 Hill, R. 586, the carrier was held not liable for samples used for effecting sales of goods. So, carriers are not liable for large sums of money, as baggage, taken for the purpose of transportation. In the case of the *Orange County Bank v. Brown*, 9 Wend. R.

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<sup>1</sup> *Orange County Bank v. Brown*, 9 Wend. R. 85.

<sup>2</sup> *Pardec v. Drew*, 25 Wend. R. 459. See *Great Northern Railway v. Shepherd*, 9 Eng. L. & Eq. R. 477.

<sup>3</sup> *Hawkins v. Hoffman*, 6 Hill, R. 586.

§ 768 c. Whether the plaintiff, in an action against the carrier for the loss of luggage, is a competent witness to testify as

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85, it was held, that the owner of a steamboat, used for carrying passengers, was not liable for a trunk, containing a large sum of money, brought on board by a passenger as baggage, the object being the transportation of the money. In the case of *Weed v. Saratoga and Schenectady Railroad Co.*, 19 Wend. R. 534, it was held, that a railroad company were liable for money in a trunk, to a reasonable amount, for travelling expenses, as baggage. In that case the sum was \$285; in the trunk of a passenger from \_\_\_\_\_ to New York. In the case above cited, from 9 Wend. R. 85, it was also supposed, though not expressly adjudged, that money for travelling expenses might be carried as baggage at the risk of the carrier. But in the case before cited, from 6 Hill, R. 586, a doubt was expressed, whether any money could be considered as baggage.

"Upon consideration of the whole subject, and referring to cases, the court have come to the conclusion, that money *bonâ fide* taken for travelling expenses and personal use may properly be regarded as forming a part of a traveller's baggage. The time has been, in our country, when the character and credit of our local currency were such, that it was expedient and needful for persons travelling through different States, to provide themselves with an amount of specie, which could not be conveniently carried about the person to defray travelling expenses. But even if bills are taken for this purpose, it may be convenient and suitable that they should be, to some amount, placed in a travelling trunk, with other necessary articles for personal use. This would seem but a reasonable accommodation to the traveller. It has been objected that the carrier will not expect that there will be money with the baggage, and will not, therefore, be put upon his guard. But, surely, a carrier may, very naturally, understand and expect, that a passenger will place his money for expenses, or some part of it, in his trunk, instead of carrying it all about his person; he certainly might as naturally expect this, as that there would be jewels or a watch in a travelling trunk, for which articles a carrier has been held responsible. The passenger is not bound to give notice of the contents of his trunks unless particular inquiry be made by the carrier. But it must be fully understood that money cannot be considered as baggage, except such as is *bonâ fide* taken for travelling expenses and personal use; and to such reasonable amount only as a prudent person would deem necessary and proper for such purpose. But money intended for trade or business or investment, or for transportation or any other purpose than as above stated, cannot be regarded as baggage." See, also, *Bomar v. Maxwell*, 9 Humphreys, R. 621; *Weed v. Saratoga and Schenectady Railroad Co.* 19 Wend. R. 534; *Johnson v. Stone*, 11 Humphreys, 419. But see *Grant v. Newton*, 1 E. D. Smith, R. 95, where the contrary rule is held.

to the contents of a lost trunk or package does not seem quite to be settled.<sup>1</sup> In some States in this country, he, and sometimes his wife, have been allowed to testify as to the value and contents of a lost trunk, where there was no imputation of fraud or violence but only of negligence.<sup>2</sup> The ground, however, upon which this rule is admitted, is that of necessity, and in some cases it has been held that an absolute necessity must exist in order to render such testimony competent.<sup>3</sup> In

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<sup>1</sup> In *Herman v. Drinkwater*, 1 Greenl. R. 27, such testimony was admitted in a case where the captain of a vessel had broken open and plundered a trunk intrusted to him; but this was upon special grounds. See, also, *Oppenheimer v. Edney*, 9 Humphreys, R. 385. The same rule applies where innkeepers break open and rob the trunks of their guests. *Sparr v. Wellman*, 11 Missouri R. 230, and 1 Yates, R. 34.

<sup>2</sup> *Mad River Railroad Co. v. Fulton*, 20 Ohio R. 318; *McGill v. Rowand*, 3 Barr, R. 451; *Clark v. Spence*, 10 Watts, R. 335; *Johnson v. Stone*, 11 Humphreys, R. 419; *Whitesell v. Crane*, 8 Watts & Serg. 369; *Gilmore v. Bowden*, 3 Fairf. R. 412.

<sup>3</sup> *Dibble v. Brown*, 12 Georgia R. 217. In this case Nesbit, J., said: "The third ground of objection, which I next notice, because more appropriate to this stage in the argument, is that the exception upon which the evidence of the plaintiff is admissible to prove the contents of a trunk in an action to charge a carrier for its loss, extends to cases only, where the carrier is proven to have been guilty of some fraud or other tortious and unwarrantable act of meddling with the plaintiff's goods, and is then only admissible, when there is no other evidence to prove the damage. In no case is it admissible, if there is other evidence of the damage, at the command of the plaintiff. If there is none, then it is true, that the spoliation being proved, the evidence of the party is admissible, *in odium spoliatoris*. This rule is fully illustrated in the case of *Herman v. Drinkwater*. There a shipmaster received on board of his vessel a trunk of goods to be carried to another port. On the passage, he broke open the trunk and rifled it of its contents, and in an action, by the owner of the goods, the plaintiff having proved, *al iunde*, the delivery of the trunk and its violation, was held competent to testify to the contents of the trunk. 1 Greenleaf, R. 27; *Childrens v. Saxby*, 1 Vern. 209; s. c. 1 Eng. Cas. Ab. 229; *Tait on Ev.* 280; 1 Greenleaf, Ev. § 348.

"The principle upon which the rule goes has been extended to the case of bailors, who have been permitted, in suits brought by themselves, for the contents of trunks lost by the *negligence* of bailees, to prove their contents. *Clark v. Spence*, 10 Watts, R. 335; *Greenleaf, Ev.* § 348. In such cases,

other States, however, the plaintiff is in no case allowed to

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growing out of the negligence of bailees, the idea of spoliation is excluded. Whilst, then, it is true, that because of the abhorrence which the law has for acts of spoliation, the evidence of a party is admissible in his own case; yet, it is true that there are other cases where, upon other grounds, a party may also testify. ‘The oath *in litem*,’ says Prof. Greenleaf, ‘is admitted, in two classes of cases. First, where it has been already proved that the party against whom it is offered, has been guilty of some fraud, or other tortious and unwarrantable act of intermeddling with the complainant’s goods, and no other evidence can be had of the amount of damages; and, secondly, where, on general grounds of public policy, it is deemed essential to the purposes of justice.’ Greenleaf, Ev. vol. 1, § 348. Again, in speaking of the admissibility of a bailor suing for the value of goods lost by the negligence of a bailee, the same learned writer says: ‘Such evidence is admitted, *not solely*, on the ground of the just odium entertained, both in equity and at law, against spoliation; but also because, from the necessity of the case, and the nature of the subject, no proof can otherwise be expected,—it not being usual even for the most prudent persons, in such cases, to exhibit the contents of their trunks to strangers, or to provide other evidence of their value. For where the law can have no force, but by the evidence of the person interested, there the rules of the common law, respecting evidence in general, are presumed to be laid aside; or rather the subordinate are silenced by the most transcendent and universal rule; that, in all cases, that evidence is good, than which the nature of the subject presumes none better to be attainable.’ Greenleaf, Ev. 1 vol. § 348. The necessity of the case and the nature of the subject are, therefore, grounds upon which the evidence of a bailor who is a party, may be admitted, to prove the contents of a lost trunk. Upon these grounds, we rule that the evidence in this case ought to have been admitted. This rule received an enlightened exposition in the case before referred to, of Clark *v.* Spence, 10 Watts, R. 335. In that case, Judge Rogers remarks: ‘A party is not competent to testify in his own case, but, like every other general rule, this has exceptions. Necessity, either physical or moral, dispenses with the ordinary rules of evidence.’

“In 12 Vin. 24, Pl. 32, it is laid down, that on a trial at Bodney’s coram Montague, B., against a common carrier, a question arose about the things in a box, and he declared that this was one of those cases where the party himself might be a witness *ex necessitate rei*. For every one did not show what he put in his box. The same principle is recognized in decisions on the statute of *Hue and Cry* in England, where a party robbed is admitted, *ex necessitate*. That a party then, can be admitted, under circumstances, to prove the contents of a box or trunk, must be admitted, &c. I then assume,

testify as to the contents or value of lost packages or trunks.<sup>1</sup> But even where such testimony is admitted, it is confined to

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upon authority, that the party's admissibility does not depend upon the fact of spoliation alone, but that he is admissible to prove the contents of a trunk, when no other evidence is attainable, upon the ground of a policy *in favorem justitiae*, springing out of the necessity of the case and the nature of the subject. Equally is the assumption sustainable upon principle; for, as argued by Greenleaf, all subordinate rules of evidence, are silenced by that universal and transcendent rule, that that evidence in all cases is good, than which the nature of the subject presumes none better to be attainable. Justice has necessities, one of which is, that wrong must be prevented, even by overruling rules of evidence, which are ordinarily not only salutary, but indispensable. The rule is applicable to this case. It is not pretended that there is any evidence attainable, to prove the contents of this trunk, but that of Mrs. Dibble. She packed it, and she alone knew its contents. The necessity of her admission, then, is found in the fact which clearly appears on the face of this record, that if she is excluded, the plaintiff loses his rights. The reason of the rule is fortified by a consideration of the confidence and trust which the public are obliged to repose in carriers, and the facility with which that confidence may be abused. Lane v. Colton, 1 Viner, Abr. 219."

<sup>1</sup> Dill v. The South Carolina Railroad Co. 7 Richardson, R. 159; Snow v. The Eastern Railroad Co. 12 Metcalf, R. 44. In this case Hubbard, J., said:—"The question whether the plaintiff was a competent witness on the trial of this action, is of much practical importance to the community, as, in consequence of the facilities for travelling, the passenger travel is constantly on the increase; and railroad corporations, being carriers of passengers and their baggage, are liable, by the rules of the common law, for losses, unless they change their liability by force of some special contract. The law of evidence is not of a fleeting character; and though new cases are occurring calling for its application, yet the law itself rests on the foundation of the ancient common law, one of the fundamental rules of which is, that no person shall be a witness in his own case. This rule has existed for ages, with very little modification, and has yielded only where, from the nature of the case, other evidence was not to be obtained, and there would be a failure of justice without the oath of the party. These are exceptions to the rule, and form a rule of themselves. In some cases, the admission of the party's oath is in aid of the trial, and in others it bears direct on the subject in controversy. Thus the oath of the party is admitted in respect to a lost deed, or other paper, preparatory to the offering of secondary evidence to prove its contents; and also for the purpose of procuring a continuance of a suit, in order to obtain testimony; and for other reasons. So the oath of a party is admitted to prove the truth of entries, in his books, of goods delivered in

those articles which are convenient or necessary for travelling.<sup>1</sup> Whether it would be allowed in respect of money is doubtful, the decisions being contradictory on that point.<sup>2</sup>

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in all amount, or of daily labor performed, when the parties, from their situation, have no evidence but their accounts, and, from the nature of the traffic or service, cannot have, as a general thing. So, in complaints, under the bastard act, where the offence is secret, but yet there is full proof of the fact,

the woman is admitted to charge the individual. In cases, also, where robberies or larcenies have been committed, and where no other evidence exists but that of the party robbed or plundered, he has been admitted witness to prove his loss; as it is said the law so abhors the act, that the party injured shall have an extraordinary remedy, *in odium spoliatoris*. Upon this principle, in an action against the hundred, under the statute of Winton, the person robbed was admitted as a witness to prove his loss, and the amount of it. Bul. N. P. 187; Esp. on Penal Sts. 211; 1 Phil. Ev. c. 5, § 2; 2 Stark. Ev. 681; Porter v. Hundred of Regland, Peake's Add. Cas. 203. So, in equity, where a man ran away with a casket of jewels, the party injured was admitted as a witness. East India Co. v. Evans, 1 Vern. 308. A case has been decided in Maine (Herman v. Drinkwater, 1 Greenl. 27) where the plaintiff was admitted to testify. In that case, a shipmaster received a trunk of goods in London, belonging to the plaintiff, to be carried in his ship to New York, and on board which the plaintiff had engaged his passage. The master sailed, designedly leaving the plaintiff, and proceeded to Portland, instead of New York. He there broke open and plundered the trunk. These facts were found *aliunde*, and the plaintiff was allowed to testify as to the contents of the trunk.

These cases proceed upon the criminal character of the act, and are limited in their nature. The present case does not fall within the principle. Here was no robbery, no tortious taking away by the defendant, no fraud committed. It is simply a case of negligence on the part of carriers. The case is not brought within any exception to the common rule, and is a case of defective proof on the part of the plaintiff, not arising from necessity, but from want of caution. To admit the plaintiff's oath in cases of this nature, would lead, we think, to much greater mischiefs, in the temptation to frauds and perjuries, than can arise from excluding it. If the party about to travel places valuable articles in his trunk, he should put them under the special charge of the car-

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<sup>1</sup> Bingham v. Rogers, 6 Watts & Serg. R. 495; Pudor v. Boston & Maine Railroad, 26 Maine R. 458.

<sup>2</sup> David v. Moore, 2 Watts & Serg. R. 230; Johnson v. Stone, 11 Humph. R. 419.

§ 768 d. It is the duty of carriers of passengers safely to deliver luggage to the owners at the end of the journey. Whether the taking off the goods at the platform of a railway, and the offer of them there to the passenger, is sufficient, depends upon the actual contract and the usage of the country, road, and place. Where the carrier is a railway company, and the usage is to admit cabs within the station, and the porters of the company carry the luggage to the cabs, as in England, it would seem, that although the luggage be identified at the platform by the passenger, yet if it be taken up again by the porter to be carried to the cab, and lost on the way, the company would be responsible.<sup>1</sup> But if the passenger should identify his luggage, and request a stranger, not a servant of the company, to carry them for him, the company would not be liable. In America, this usage does not generally exist, and it would seem that the delivery on the platform would terminate the responsibility of the railway company as carriers, unless they employed porters of their own to attend to the removal of the luggage to cabs and hacks. But where trunks are ticketed, it would seem that the company would be responsible as carriers until the passenger had reasonable time to claim his luggage, and from that time

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riers, with a statement of what they are, and of their value, or provide other evidence, beforehand, of the articles taken by him. If he omits to do this he then takes the chance of loss, as to the value of the articles, and is guilty, in a degree, of negligence — the very thing with which he attempts to charge the carrier. Occasional evils only have occurred, from such losses, through failure of proof; the relation of carriers to the party being such that the losses are usually adjusted by compromise. And there is nothing to lead us to innovate on the existing rules of evidence. No new case is presented; no facts which have not repeatedly occurred, no new combination of circumstances.

“We are of the opinion that the testimony of the party was improperly admitted; and the verdict is, therefore, set aside and a *new trial granted*.”

<sup>1</sup> *Butcher v. The London and South-Western Railway Co.* 29 Eng. Law & Eq. R. 349; *Richards v. The London, Brighton, and South Coast Railway Co.* 7 Com. Bench R. 839.

they would be responsible as warehouse-men for storing the goods.<sup>1</sup>

## CARRIERS OF PASSENGERS BY WATER.

§ 769. Carriers by water are bound by the same general rules as carriers by land. There are, however, certain rights and duties specifically belonging to carriers by water, which it may be as well briefly to advert to. And in the first place, where the passage is of a length requiring it, they are bound to furnish good and proper provision, and in sufficient quantity for the voyage. Lord Denman, in addressing the jury in a particular case, thus lays down the rule—"I think the result of the evidence is, that the captain did not supply so large a quantity of food and fresh provisions as is usual under such circumstances. But there is no real ground of complaint, no right of action, unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had, that he has, therefore, a right of action against the captain, who does not provide all that he ought; you must be satisfied that there was a real grievance sustained by the plaintiff."<sup>2</sup>

§ 769 *a.* Again, a master of a vessel is necessarily, from the nature of his office, invested with a very large authority; he is a dictator, bound to see that the little republic of the vessel receives no detriment, and may command strict obedience to all orders within the proper exercise of his authority. In case of improper behavior, and specially in case of violence or threats, he may exclude the passenger from the cuddy, and restrict him to a particular part of the vessel, and oblige him to take his meals alone.<sup>3</sup> Whether such impropriety have been committed in the particular case is of course a question for a jury;

<sup>1</sup> See ante, § 759 *a* to 759 *e.*

<sup>2</sup> Young *v.* Fewson, 8 Car. & Payne, R. 56.

<sup>3</sup> Prendergast *v.* Compton, 8 Car. & Payne, R. 454.

but it seems that ungentlemanly behavior on the part of the passenger is a justification of the captain.<sup>1</sup> Again, he may in case of necessity use all proper means to enforce his orders, and even may place a passenger in confinement who refuses to obey him; but he must be careful not to do more than the necessity of the case demands.<sup>2</sup> And in case of necessity, he may even oblige the passenger to work in defence of the ship or for the preservation of the lives of those on board.<sup>3</sup>

§ 769 b. His correlative duties to the passengers are, to exert his utmost skill and care; and if, in consequence of his want of strictest caution, injury result to them he is liable.<sup>4</sup> In this respect his duty is simply that of a common carrier of passengers.<sup>5</sup> Besides this, he is bound to behave himself decently and decorously; and if he be habitually immodest where there are females, or oppressive and malicious, he is liable therefor in damages. Indeed, he stipulates by implication “against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of feeling, which aggravates every evil, and endeavors, by the excitement of terror and cool malignancy of conduct, to inflict torture on susceptible minds.”<sup>6</sup>

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<sup>1</sup> Prendergast *v.* Compton, 8 Car. & Payne, R. 454.

<sup>2</sup> Boyce *v.* Bayliffe, 1 Camp. R. 58; 3 Kent, Comm. p. 183; Abbott on Shipping, (5th Am. ed.) 282; Newman *v.* Walters, 3 Bos. & Pul. 612.

<sup>3</sup> Newman *v.* Walters, 3 Bos. & Pul. R. 612; Boyce *v.* Bayliffe, 1 Camp. R. 58.

<sup>4</sup> Malton *v.* Nesbit, 1 Car. & Payne, R. 70.

<sup>5</sup> See ante, § 765.

<sup>6</sup> Chamberlain *v.* Chandler, 3 Mass, C. C. R. 245. In this case Mr. Justice Story thus lays down the law on this point. “In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship-room and personal existence on board; but for reasonable food, comforts, necessaries, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment; for that decency of demeanor which constitutes the charm of social life; for that attention

§ 769 c. Where a captain of a vessel, who has contracted to carry passengers, dies, his representatives are entitled to the benefit of the contract, and may maintain an action for the purchase-money. "If the mate lays out money in purchasing stores for such passengers, he is the agent of the representatives for that purpose, and may oblige them to repay him. But where, after the death of the captain, the mate contracts to carry passengers on the homeward voyage, he is himself entitled to the benefit of the contract, and may retain the whole of the passage money. If, for the entertainment of such passengers, he has any part of the stores laid in

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which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors, by the excitement of terror, and cool malignancy of conduct, to inflict torture upon susceptible minds. What can be more disreputable, and at the same time more distressing, than habitual obscenity, harsh threats, and immodest conduct, to delicate and inoffensive females? What can be more oppressive than to confine them to their cabins by threats of personal insult or injury? What more aggravating than a malicious tyranny, which denies them every reasonable request, and seeks revenge by withholding suitable food and the common means of relief, in cases of sea-sickness and ill health? It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. The law looks on them as unworthy of its cognizance. The master is at liberty to inflict the most severe mental sufferings, in the most tyrannical manner, and yet, if he withholds a blow, the victim may be crushed by his unkindness. He commits nothing within the reach of civil jurisprudence. My opinion is, that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct or of consequential injuries. In each case the contract of the passengers for the voyage is in substance violated; and the wrong is to be redressed as a cause of damage. I do not say that every slight aberration from propriety or duty, or that every act of unkindness or passionate folly, is to be visited with punishment; but if the whole course of conduct be oppressive and malicious, if habitual immodesty is accompanied by habitual cruelty, it would be a reproach to the law, if it could not award some recompense."

by the captain, for so much he must account to the captain's representatives."<sup>1</sup>

§ 769 d. Where there is a *collision* between two vessels, and both parties are in fault, the loss is to be apportioned between them, unless the want of ordinary care on the part of one did not contribute to produce the injury.<sup>2</sup> Where neither party is in fault, the loss must be borne by the party upon whom it falls. Where the party injured is in fault, he must bear the loss. Where the party injuring is in fault, he must fully compensate the other. Where it cannot be discovered to which party blame attaches, the loss is apportioned equally between them.<sup>3</sup> A lien is always created on the ship in fault which follows it into whatever hands it goes.<sup>4</sup>

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<sup>1</sup> Per Mr. Justice Bayley, in *Siordet v. Brodie*, 3 Camp. R. 253.

<sup>2</sup> *Sills v. Brown*, 9 Car. & Payne, 601; *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. R. 420; *Rathbun v. Payne*, 19 Wend. R. 399; *Mariott v. Stanley*, 1 Scott, N. R. 392; *Raisin v. Mitchell*, 9 Car. & Payne, 613; *Angell on Carriers*, § 638-640.

<sup>3</sup> *The Woodrop Sims*, 2 Dod. 83, 85; *The Catharine of Dover*, 2 Hagg. Adm. R. 145; *1 Bell, Comm.* p. 580; *Abbott on Shipping*, part 3, ch. 1; *3 Kent, Comm. Lect. 47*, p. 230, 231; *1 Emer. Assur. ch. 12*, § 14, p. 417, 418; *2 Valin, Lect. 3*, tit. 7, art. 11, p. 183; *Lecheve v. Edinb. & Lond. Shipp. Co.* decided in House of Lords, June 15, 1824; *The Ligo*, 2 Hagg. Adm. R. 356; *Dig. Lib. 9*, tit. 2, l. 29, § 2; *The Dundee*, 1 Hagg. Adm. R. 109; *Gale v. Laurie*, 5 B. & C. 156; *Story on Bailm.* § 605, et seq.; *Strout v. Foster*, 1 How. U. S. R. 89; *The Massachusetts*, 1 W. Robinson, R. 373.

<sup>4</sup> *The Bold Buccleugh*; *Harmer v. Bell*, 7 Moore, P. C. 267; 22 Eng. Law & Eq. R. 62. The court said: "It is further said, that the damage confers no lien upon the ship, and a *dictum* of Dr. Lushington, in the case of *The Volant*, 1 W. Rob. 387, is cited as an authority for this proposition. By reference to a contemporaneous report of the same case, (1 Notes of Cases, 508,) it seems doubtful whether the learned judge did use the expression attributed to him by Dr. W. Robinson. If he did, the expression is certainly inaccurate, and being a *dictum* merely, not necessary for the decision of that case, cannot be taken as a binding authority.

"A maritime lien does not include or require possession. The word is used in maritime law, not in the strict legal sense in which we understand it

§ 770. There are also some laws of the sea corresponding to the law of the road. Thus, a vessel having the wind free,

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in courts of common law, in which case there could be no lien where there was no possession, actual or constructive ; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well established in the civil law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of the civil law, a maritime law is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process ; and Mr. Justice Story, 1 Sumner, R. 70, explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the admiralty enforces it by a proceeding *in rem*, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches ; and whilst it must be admitted that the lien attaches ; and whilst it must be admitted, that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached. This simple rule, which, in our opinion, must govern this case, and which is deduced from the civil law, cannot be better illustrated than by reference to the circumstances of The Aline, referred to in the argument, and decided in conformity with this rule, though apparently upon other grounds. In that case, there was a bottomry bond before and after the collision, and the court held, that the claim for damage in a proceeding *in rem*, must be preferred to the first bondholder, but was not entitled against the second bondholder to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction.

“ This rule, which is simple and intelligible, is in our opinion, applicable to

must give way to one close-hauled on the wind; a vessel sailing with the wind, must give way to one sailing by the wind; and the latter need not alter her course. When vessels cross each other, and there is the least doubt of their going clear, the vessel on the starboard tack takes precedence, and keeps her course; and the vessel on the larboard tack must bear up, or keep more away before the wind. So, also, a vessel entering port, where other vessels lie at anchor, must use proper checks to prevent a collision. So, also, steamboats must always give precedence to ships under sail.<sup>1</sup> And whenever a steamer is hailed in a fog, she must back her engines; and if she merely put her helm to port, according to the general rules applicable to sailing vessels, she will not be exonerated in case of collision.<sup>2</sup> The ground of all these rules is, that the vessel which can give way with the least inconvenience, is bound so to do; and every rule is subordinate to the rule, that every vessel shall keep clear of every other, when she has power to do so, notwithstanding the other have not conformed to the usual and established course.<sup>3</sup>

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all cases. It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosesoever possession the thing may come."

<sup>1</sup> Hawkins *v.* The Dutchess and Orange Steamboat Co. 2 Wend. R. 452; Lowry *v.* Steamboat Portland, 1 Law Rep. 1839, p. 313.

<sup>2</sup> The Perth, 3 Hagg. R. 414; The James Watt, 2 Rob. R. 270.

<sup>3</sup> See Lowry *v.* The Steamboat Portland, 1 Law Rep. 1839, p. 313, in which case the learned district judge took the opinion of several distinguished nautical men, on oath. The Woodrop Sims, 2 Dod. R. 83; 3 Kent, Comm. Lect. 47, p. 230, 231; The Thames, 5 Rob. R. 345; Angell's Law Intell. for 1829, p. 20; Handyside *v.* Wilson, 3 Car. & P. R. 528; Jameson *v.* Drinkald, 12 Moore, R. 148; The De Cock Monthly Law Mag. Eng. vol. 5, p. 303; The Shannon, 2 Hagg. R. 174; The Neptune, 1 Dod. R. 467; Hawkins *v.* Dutchess and Orange Steamboat Co. 2 Wend. R. 452; Story on Bailm. § 611, 612 a. See The Alexander Wise, 2 Rob. Adm. R. 65. The Trinity rules promulgated by the Trinity House Corporation of England, on the 30th Oct. 1840, provide as follows: "Whereas the recognized rule for sailing vessels is, that

§ 770 a. In cases of collision or injury of any kind happening to a vessel, by which a passenger receives damage, the owner of the vessel is directly responsible to him, even although the vessel be, at the time of the collision or injury, in the charge of a pilot, who has the entire control of her, the pilot in this respect being deemed the agent of the owner.<sup>1</sup> The pilot is of course also liable.<sup>2</sup> The master in such a case would not in this country be liable, his authority being entirely suspended by that of the pilot.<sup>3</sup> By some of the English pilotage statutes, however, neither master nor owner is liable when there is a licensed pilot on board.<sup>4</sup> And where collision even between American vessels takes place in an English port, the English statutes govern.<sup>5</sup>

§ 770 b. In this country, the duties of the masters and owners of steamers have been the subject of legislation by Congress;<sup>6</sup> and it is provided, that certain competent persons shall be appointed by the district judge of each district, to make inspection of the boilers and machinery of steamers, as well as of the hull, and give certificates thereof; and that the examination of the boilers and machinery shall be made every six months, and of the hulls every twelve months. It is also

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those having the wind fair shall give way to those on a wind; that when both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand; that when both vessels have the wind large or abeam and meet, they shall pass each other in the same way on the larboard hand, to effect which two last-mentioned objects, the helm must be put to port."

<sup>1</sup> *Yates v. Brown*, 8 Pick. R. 23; *Smith v. Condry*, 1 Howard, (U. S.) R. 28; *Bussey v. Donaldson*, 4 Dallas, R. 206; *Fletcher v. Braddick*, 5 Bos. & Pul. R. 182; *Angell on Carriers*, § 664.

<sup>2</sup> *Ibid.* See, also, 3 Kent, Comm. 176; *Snell v. Rich*, 1 Johns. R. 305; *Yates v. Brown*, 8 Pick. R. 2; *Angell on Carriers*, § 193, note.

<sup>3</sup> *Snell v. Rich*, 1 Johns. R. 305.

<sup>4</sup> 6 George IV. c. 125; *Carruthers v. Sydebotham*, 4 Maule & Selw. R. 77.

<sup>5</sup> *Smith v. Condry*, 1 Howard, (U. S.) R. 28.

<sup>6</sup> Act of 1838, ch. 191; Act of 1843, ch. 94.

provided, that, in stoppage, the safety-valve shall be opened so as to keep down the steam; and that two longboats or yawls shall be carried by every steamer of two hundred tons' tonnage, and three by large steamers; and that suction-hose and fire-engines and hose shall be provided, and iron rods and chains for steering the steamer; and that from sunset to sunrise one or more signal lights shall be carried; and that all additional apparatus for steering which the inspector shall deem fit shall be provided, so that if the steersman is driven from his post, the vessel may be steered. These duties are imposed under heavy penalties; and if, in consequence of a neglect of them by the captain, engineer, or pilot, any life is lost, he is treated as guilty of manslaughter.

## CHAPTER XII.

## POSTMASTERS AND MAIL CONTRACTORS.

§ 771. *Postmasters.* The post-office establishment is created by statute, for the purpose of revenue and public convenience. The postmaster-general enters into no contract with individuals, but receives a general compensation from the government itself. He is, therefore, responsible only to the government, and his contracts are public contracts, binding upon the government, and not upon himself personally.<sup>1</sup> But although the postmaster-general is not responsible to third persons, either for his own default, or for that of his deputies,<sup>2</sup> yet the deputy-postmasters are held liable to third persons for losses arising from their own fraud, or want of proper diligence, as for detaining a letter for an unreasonable time;<sup>3</sup> or for losses occurring through the fraud, or want of proper diligence of the subordinates, whenever they themselves have not exercised a due and reasonable diligence in the appointment of such subordinates, or have not properly superintended their official acts.<sup>4</sup>

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<sup>1</sup> *Rowning v. Goodchild*, 3 Wils. R. 443; *Whitfield v. Despencer*, Cowp. R. 754; *Story on Agency*, § 302 to 307; *Story on Bailm.* § 462, 463, 464; 1 Bell, Comm. § 468; *Dunlop v. Munroe*, 7 Cranch, (U. S.) R. 242; *Bolan v. Williamson*, 2 Bay, (S. Car.) R. 551; *Schroyer v. Lynch*, 8 Watts, (Penn.) R. 453.

<sup>2</sup> See *Wiggins v. Hathaway*, 6 Barb. R. 632.

<sup>3</sup> *Rowning v. Goodchild*, 3 Wils. R. 443; *Stock v. Harris*, 5 Burr. R. 2709.

<sup>4</sup> *Dunlop v. Munroe*, 7 Cranch, R. 242, 269; *Whitfield v. Despencer*, Cowp. R. 754; *Story on Bailm.* § 463; *Schroyer v. Lynch*, 8 Watts, R. 453; 2 Law Rep. 229.

Each person is, however, personally responsible to the government for want of ordinary diligence.

§ 771 a. *Mail Contractors.* The same general rule as to post-masters, excluding them from personal liability, would seem also to apply to mail contractors, on the ground that they make no personal contracts with the senders of letters, and receive no pay from them for the carriage. And as they merely act as public officers, and are remunerated by the government, they are responsible solely to their employers.<sup>1</sup>

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<sup>1</sup> Conwell *v.* Voorhees, 13 Ohio R. 523; Hutchins *v.* Brackett, 2 Foster, R. 252.

## CHAPTER XIII.

## SALE OF PERSONAL PROPERTY.

§ 772. THE next subject of which we propose to treat, is the Contract of Sales of Personal Property.<sup>1</sup> Any person who can make any other contract, may make a contract of sale. The doctrines of law, applicable to contracts in general, in regard to the competency of parties, the immorality or illegality of the contract, and the fraud of the parties, are equally applicable to the contract of sale, and will not be considered under this head.

§ 773. A sale is a transfer of the absolute title to property for a certain agreed price.<sup>2</sup> Unless the absolute title be conveyed, the contract is merely a mortgage, or bailment, and not a sale. Three things, therefore, are requisite to a valid sale: 1st. The subject to be sold; 2d. The price; 3d. The mutual consent of the parties. We shall consider these in order.

## THE SUBJECT.

§ 774. The thing to be sold must have an actual or possible existence, and must be capable of delivery. Thus, if A. sell a

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<sup>1</sup> For a full consideration of this subject, see Story on Sales of Personal Property.

<sup>2</sup> As to the difference between a Sale and an Exchange, see Vail *v.* Strong, 10 Verm. R. 457; Mitchell *v.* Gile, 12 N. Hamp. R. 390.

horse, or certain goods, to B., and at the time of the sale the horse be actually dead, or the goods be destroyed, the sale would be void, even though it be made without fraud.<sup>1</sup> But if such goods be partially destroyed at the time of the sale, the buyer may either take them at a *pro tanto* reduction of the price, or he may abandon the contract.<sup>2</sup>

§ 775. So, also, although the thing to be sold have no actual and present existence, yet if it be the anticipated product or increase of some thing to which the seller has a present vested right, the sale will be good. Thus, a sale may be made of all the wool that shall grow on the sheep owned by the seller, at the time of the sale; or of all the young that shall be born of them. So, also, a sale of the fruit that shall grow on the seller's vines; or of the wine which the grapes from his vines shall yield, is good.<sup>3</sup> So, also, a sale may be made of any indeterminate thing, to which the vendor's right is not contingent; as of the casting of his net by a fisherman.<sup>4</sup>

§ 776. But a mere possibility, or contingency, not coupled with any present interest in the property, or not growing out of property which the seller already owns, cannot be the subject of a present sale, though it may be of an executory agreement to sell.<sup>5</sup> Thus, a man cannot sell all the wool of all the

<sup>1</sup> Allen *v.* Hammond, 11 Peters, R. 63; Pothier, *Contrat de Vente*, § 4; Hitchcock *v.* Giddings, 4 Price, R. 135. See ante, *Mistake*; 2 Kent, Comm. Lect. 39, p. 469.

<sup>2</sup> 2 Kent, Comm. Lect. 39, p. 469; Pothier, *Contrat de Vente*, No. 4; Compton *v.* Brown, Esp. Dig. 13, cited in 1 T. R. 136.

<sup>3</sup> Long on Sales, Rand's ed. 4; 2 Kent, Comm. Lect. 39, p. 468, n. b; Pothier, *Contrat de Vente*, No. 4, 5; Com. Dig. Grant, C; Clapham *v.* Moyle, 1 Lev. R. 155; Grantham *v.* Hawley, Hob. R. 132; Robinson *v.* Macdonnell, 5 Maule & Selw. R. 228, 236; Wood & Foster's case, 1 Leon. R. 42; Strickland *v.* Turner, 14 Eng. Law & Eq. R. 471.

<sup>4</sup> Plutarch's Life of Solon; Pothier, *Contrat de Vente*, No. 6.

<sup>5</sup> Comm. Dig. Grant, D., Assignment, C. 3; Vasse *v.* Comegys, 4 Wash. R. 570; Robinson *v.* Macdonnell, 5 M. & S. R. 228; Campbell *v.* Mullet, 2 Swanst.

sheep that he may hereafter buy,<sup>1</sup> or any thing else of which he has merely a prospective interest, without any right. So, also, he cannot make a present sale of goods to which he has no present or contingent right, but which he intends to go into the market and buy. But he may agree to procure goods which he has not, and to furnish them at a future time for a certain price, and this contract will be good; although it will not be strictly a sale, but only an agreement to sell. A contingent future right to an actual thing, as a reversionary interest or expectancy, founded upon a settlement or entailment, is, however, a subject of sale.<sup>2</sup> But a mere hope of succession, without any existing right, can only be the subject of an executory contract.<sup>3</sup>

§ 777. So, also, the subject of a sale must be legal, or the sale will be void. Thus, where bricks were sold of other dimensions than those required by statute, 17 Geo. III. ch. 42, under a penalty, it was held, that an action for the price could not be supported.<sup>4</sup> So, also, when the selling of game was prohibited by the statute, a contract for the sale of pheasants was held to pass no property.<sup>5</sup>

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R. 551; *Mulklow v. Mangles*, 2 Stark. Ev. 339; *Atkinson v. Bell*, 8 B. & C. R. 277; 2 Kent, Comm. Lect. 39, p. 466; *Carleton v. Leighton*, 3 Meriv. R. 667; *Rondeau v. Wyatt*, 2 H. Bl. R. 63; *Groves v. Buck*, 3 M. & S. R. 178.

<sup>1</sup> *Grantham v. Hawley*, Hob. R. 132; *Bac. Abr. Grant*, D.; 2 Story, Eq. Jurisp. § 1040, 1055 b; *Langton v. Horton*, 1 Hare, R. 556, 557; *Trull v. Eastman*, 3 Metcalf, R. 121. But see *Hibblewhite v. M'Morine*, 3 Mees. & Welsb. R. 462; *Screws v. Roach*, 22 Ala. R. 675; *Stanton v. Small*, 3 Sandf. R. 230.

<sup>2</sup> *Carleton v. Leighton*, 3 Meriv. R. 667.

<sup>3</sup> 2 Story, Eq. Jurisp. § 1040, 1040 b, 1055; *Langton v. Horton*, 1 Hare, R. 556, 557; *Trull v. Eastman*, 3 Metcalf, R. 121; 2 Kent, Comm. Lect. 39, p. 468.

<sup>4</sup> *Law v. Hodson*, 11 East, R. 300; 2 Camp. R. 147.

<sup>5</sup> *Helps v. Glenister*, 8 B. & C. R. 553. So, also, see generally, *Langton v. Hughes*, 1 M. & S. R. 593; *De Begnis v. Armistead*, 10 Bing. R. 107; *Brown v. Duncan*, 10 B. & C. R. 93; *The King v. Major*, 4 T. R. 750; *Tyson v. Thomas*, McLell. & Younge, R. 119. See ante, *Illegal Contracts*.

## CHAPTER XIV.

## THE PRICE.

§ 778. THERE can be no sale without a price. *Sine pretio nulla venditio est.*<sup>1</sup> Unless there be a valuable consideration, it is a gift. So, also, the price must be in money, or in its negotiable representative — as notes or bills; for if articles be given one for another, it is merely a *barter*. The same principles of law, however, govern in cases of barter and of sale. The price must be a sum of money, either certain and definite, or susceptible of ascertainment by reference to some criterion prescribed in the contract,<sup>2</sup> so as to render further negotiation between the parties unnecessary.<sup>3</sup> Thus, a reference to a certain sum given by another person, or to the arbitration of a third person, is sufficient.<sup>4</sup> Mere inadequacy of price, however, affords no ground to set aside a sale, unless it be of so gross a nature as to afford a necessary presumption of fraud and imposition, and then a court of equity will grant relief.<sup>5</sup>

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<sup>1</sup> Dig. Lib. 18, tit. 1, ch. 2; Institut. Lib. 3, tit. 24; Pothier, *Contrat de Vente*, art. 11, n. 16, 17, 18, &c.

<sup>2</sup> See *Dickson v. Jordan*, 12 Iredell, R. 79.

<sup>3</sup> *Flagg v. Mann*, 2 Sumner, R. 539; 2 Kent, Comm. Lect. 39, p. 477; Long on Sales, 5; 1 Bell, Comm. 437; Brown on Sales, 148; *Brown v. Bellows*, 4 Pick. R. 189; Pothier, *Contrat de Vente*, No. 23, 24.

<sup>4</sup> 1 Stair, B. 1, T. 14; *Brown v. Bellows*, 4 Pick. R. 189.

<sup>5</sup> The rule in the civil law was, that a sale for one half the value of the property might be set aside for inadequacy. 1 Domat, Civ. Law, B. 1, tit. 2, § 3, 9, art. 1; Heinric. Elem. 1 N. & G. § 352; Ibid. § 346; Cod. Lib. 4, tit.

44, l. 2, 9; Pothier on Oblig. by Evans, § 30, 33, 34; Osgood *v.* Franklin, 2 Johns. Ch. R. 23, 24; Copis *v.* Middleton, 2 Madd. Ch. R. 410; Griffith *v.* Spratley, 1 Cox, R. 383; Butler *v.* Haskell, 4 Des. S. C. Eq. R. 651; Nott *v.* Hill, 1 Vern. R. 167; 2 Vern. R. 27; Story on Eq. Jurisp. § 244, 245, and cases cited; Robinson *v.* Schly & Cooper, 6 Georgia (T. R. R. Cobb), R. 515; Bedel *v.* Loomis, 11 N. Hamp. R. 9.

## CHAPTER XV.

## CONSENT OF THE PARTIES.

§ 779. UNLESS there be a mutual consent of both parties to terms which are either certain, or capable of being rendered certain by reference to some definite criterion, there is no sale. Thus, any mistake as to the identity of the thing to be sold, or as to the price demanded or offered, will vitiate the sale; except where the buyer supposes the price to be larger than the seller has consented to take. Such a mistake, however, should be with regard to a fact or circumstance going to the essence of the contract, and not of an immaterial or un consequential fact.<sup>1</sup> The negotiation of sale may be carried on by letter; and the sale becomes complete when the buyer puts his answer, assenting to the seller's proposition, into the mail. But the seller may retract his offer at any time previous to the mailing of the buyer's letter containing his assent.<sup>2</sup>

§ 779 *a.* As the rules applicable to this subject have already been fully considered in a previous part of this treatise, it is unnecessary to repeat them here,— and the reader is, therefore, referred to the chapter in which they are stated.<sup>3</sup>

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<sup>1</sup> See ante, § 102, 103, 104, 105, 106.

<sup>2</sup> See ante, § 84, and notes.

<sup>3</sup> Vol. I. ch. XVI.

## CHAPTER XVI.

## OF THE FORM OF A CONTRACT OF SALE.

§ 780. THE simplest form of a sale is when the price is paid, and the article is immediately delivered. But inasmuch as there can be a sale of a thing *in futuro*, and, also, since the thing sold may not be in the actual possession of the seller, subsequent acts by one or both parties often become necessary, in order to complete the sale. In those contracts of sale, therefore, which are not perfected at once, by payment and delivery, the statute of frauds<sup>1</sup> requires certain formalities to be observed. The fourth section of this statute enacts, that "no action shall be brought whereby to charge any person upon any agreement, that is not to be performed within the space of one year from the making thereof; unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." And the seventeenth section of the same statute enacts, that "no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall (1.) accept part of the goods so sold, and actually receive the same; or (2.) give something in earnest to bind the bargain, or in part payment; or (3.) that some note or memorandum in writing of the said bargain be made

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<sup>1</sup> 29 Car. 2, 63, § 4, 17. For a consideration of the Statute of Frauds, see post, § 1015 *a*, et seq.

and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”<sup>1</sup>

§ 781. In respect to this statute, the first remark to be made is, that where several different articles are bought at the same time, it is not necessary that the price of each article should be ten pounds, to bring it within the terms of the statute; for in case several articles are bought at once, if the price of all be above the limited price in the statute, the mere fact that the price of each particular article is below it, will not, take the contract out of the statute; a contract made for several articles being considered as an entire contract for all, if they be all purchased at once, and make a portion of one transaction.<sup>2</sup>

§ 782. We shall consider these exceptions in their reverse order, for the sake of convenience. First, as to the construction which has been given to the terms, “some note or memorandum of the *agreement*,” in the fourth section; and to the terms, “some note or memorandum of the said *bargain*,” in the seventeenth section. The interpretation of these terms has been a subject of much controversy; but it is now settled, that the memorandum required by the fourth section should set forth distinctly both the promise and the consideration, either by its own contents or by reference to something extrinsic, by which it may be rendered certain; that it should be signed by at least one of the parties; and that the name of the other should appear on it.<sup>3</sup> The exact terms

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<sup>1</sup> The amount necessary to bring a sale within the provisions of this statute is fixed, in New York, at \$50; in Vermont, at \$40; in Maine, at \$30; in New Hampshire, at \$33.33; and in Massachusetts, at \$50. In Rhode Island, this particular provision has never been adopted.

<sup>2</sup> *Baldey v. Parker*, 2 Barn. & Cres. R. 37; *Elliott v. Thomas*, 3 Mees. & Welsb. R. 176; *Scott v. Eastern Counties Railway Co.* 12 Mees. & Welsb. R. 38; *Chambers v. Griffiths*, 1 Esp. N. P. R. 151; *Biggs v. Wiking*, 25 Eng. Law & Eq. R. 257.

<sup>3</sup> The first case on this subject was *Wain v. Warlters*, 5 East, R. 10, which was modified subsequently by the case of *Stapp v. Lill*, 1 Camp. R. 242, and

of the consideration need not, however, be stated, and it need only appear, that there is some sufficient consideration.<sup>1</sup> Whether that consideration were or were not performed is matter of evidence.<sup>2</sup>

§ 783. The terms of the seventeenth section differ from those of the fourth section. The seventeenth section requires that there be "some memorandum of the *bargain*," and not of the *agreement*; and it is to be "signed by the *parties to be charged*." The term "bargain" in the statute has been interpreted to mean the terms upon which the parties contract.<sup>3</sup> In a sale of goods, therefore, the names of the buyer and seller, and the commodity must distinctly appear.<sup>4</sup> So, also, if a specific price be agreed upon, it must be stated in the memorandum;<sup>5</sup> but if no price be either agreed upon or expressed, the law will imply a reasonable price.<sup>6</sup> It is not necessary, however, that the memorandum shall be signed by both parties.<sup>7</sup>

<sup>9</sup> East, R. 348; Lyon *v.* Lambe, Fell on Merc. Guar. 318; Morris *v.* Stacey, Holt, N. P. R. 153; 2 Stark. Ev. 349; Champion *v.* Plummer, 4 Bos. & Pul. R. 252; Wheeler *v.* Collier, 1 Mood. & Malk. R. 123; Boys *v.* Ayerst, 6 Mad. R. 316. See, also, Jenkins *v.* Reynolds, 3 Brod. & Bing. R. 14; Saunders *v.* Wakefield, 4 B. & Ad. R. 595; Morley *v.* Boothby, 3 Bing. R. 107; Lees *v.* Whitcomb, 5 Bing. R. 34; Cole *v.* Dyer, 1 Cr. & Jerv. 461; Newbury *v.* Armstrong, 6 Bing. R. 201; James *v.* Williams, 3 Nev. & M. 196; 5 Barn. & Ad. 1109; Laytharp *v.* Bryant, 3 Scott, R. 250; Sears *v.* Brink, 3 Johns. R. 210; Rogers *v.* Kneeland, 13 Wend. R. 114; Peltier *v.* Collins, 3 Wend. R. 459. See, also, Egerton *v.* Mathews, 6 East, R. 308; and note (1). But see Ex parte Gardom, 15 Ves. 287, 288.

<sup>1</sup> Union Bank of Louisiana *v.* Coster, 1 Sandf. S. C. R. 563. See Bainbridge *v.* Wade, 1 Eng. Law & Eq. R. 236.

<sup>2</sup> Stapp *v.* Lill, 1 Camp. R. 242; 9 East, 348.

<sup>3</sup> Kenworthy *v.* Schofield, 2 B. & C. R. 947.

<sup>4</sup> Champion *v.* Plummer, 1 Bos. & Pul. N. R. 254.

<sup>5</sup> Kain *v.* Old, 2 B. & C. R. 627; Elmore *v.* Kingscote, 5 B. & C. R. 583; Kenworthy *v.* Schofield, 2 B. & C. R. 947.

<sup>6</sup> Hoadly *v.* M'Laine, 10 Bing. R. 482; 4 Moore & Scott, 340.

<sup>7</sup> Egerton *v.* Mathews, 6 East, R. 307; Laytharp *v.* Bryant, 3 Scott, R. 250; 2 Stark. Ev. 356; Weightman *v.* Caldwell, 4 Wheat. R. 85, and note; Allen *v.* Bennet, 3 Taunt. R. 169; Western *v.* Russell, 3 Ves. & B. R. 192;

It is sufficient if the name of the party charged appear thereupon; and he will be bound, not only when it is signed by him, but whenever his name is written or printed within the body thereof, by his own order, or with his consent.<sup>1</sup> Thus, if the memorandum commence, "I, A. B., promise," it is sufficient.<sup>2</sup> So, also, a shop-bill or bill of parcels, filled up by him, or by his order, is sufficient.<sup>3</sup> Where, however, the name of the party charged is not signed, but appears in the body of the paper, he will not be bound; unless it be evident that he meant to be bound by it as a complete contract.<sup>4</sup> So, also, a parol acceptance of a proposal by letter has been held to be sufficient.<sup>5</sup>

§ 784. Again, if the terms of the contract can be collected from the correspondence of the parties, or from any two separate papers, referring manifestly to the same subject, it will be a sufficient memorandum, within the 17th section.<sup>6</sup> But a

Martin *v.* Mitchell, 2 Jack. & Walk. R. 426; Flight *v.* Bolland, 4 Russ. R. 298; Ballard *v.* Walker, 3 Johns. Cas. R. 60; Palmer *v.* Scott, 1 Russ. & Mylne, R. 391; Seton *v.* Slade, 7 Ves. R. 265; Clason *v.* Bailey, 14 Johns. R. 487; 2 Kent, Comm. Lect. 39, p. 510; Long on Sales, 54; Russell *v.* Nicoll, 3 Wend. R. 112.

<sup>1</sup> Johnson *v.* Dodgson, 2 Mees. & Welsb. R. 653; Schneider *v.* Norris, 2 Maule & Selw. R. 286; Propert *v.* Parker, 1 Russ. & Mylne, R. 625; Knight *v.* Crockford, 1 Esp. R. 190; Saunderson *v.* Jackson, 2 B. & P. R. 238; Stokes *v.* Moore, 1 Cox, R. 219; Selby *v.* Selby, 3 Meriv. R. 2; Ogilvie *v.* Foljambe, 3 Meriv. R. 53; Penniman *v.* Hartshorn, 13 Mass. R. 87.

<sup>2</sup> Propert *v.* Parker, 1 Russ. & Mylne, R. 625; Knight *v.* Crockford, 1 Esp. R. 190.

<sup>3</sup> Schneider *v.* Norris, 2 Maule & Selw. R. 286; Batturs *v.* Sellers, 5 Harr. & John. R. 117.

<sup>4</sup> Johnson *v.* Dodgson, 2 Mees. & Wels. R. 563; Long on Sales, Rand's ed. 57.

<sup>5</sup> Stark. Ev. 651, and cases cited.

<sup>6</sup> Saunderson *v.* Jackson, 2 Bos. & Pul. R. 238; 3 Esp. R. 180; Dobell *v.* Hutchinson, 3 Ad. & Ell. R. 355; 5 Nev. & Man. R. 251; Smith *v.* Surman, 9 B. & C. R. 561; Richards *v.* Porter, 6 B. & C. R. 437; Kenworthy *v.* Schofield, 2 B. & C. R. 945; Allen *v.* Bennet, 3 Taunt. R. 169; Jackson *v.* Lowe, 1 Bing. R. 9; Gale *v.* Nixon, 6 Cow. R. 445; Hemming *v.* Perry, 2 Moore &

mere written statement of the terms of a bargain made by the party charged, will not be sufficient to charge him; unless it appear that he considered the bargain as complete, and intended to be bound by it.<sup>1</sup>

§ 785. In all these cases, however, the contract must be perfectly intelligible from the writings themselves, without resort to verbal testimony; for, otherwise, the very object of the statute, which is to prevent controversies and collusive testimony, would be frustrated.<sup>2</sup> Again, for the same reason, it is manifest that, if there be any material discrepancy or contradiction between letters or papers, this circumstance will prevent them from being a sufficient memorandum.<sup>3</sup> Whether such contract have been complied with, and the extent to which it has been complied with, and the manner in which it has been performed, may be shown by verbal testimony. But the actual terms of the contract itself cannot be shown by verbal testimony, however full and complete it may be. And even sales by auction, which are held to be within both sections,<sup>4</sup> although made in the presence of so many witnesses, and susceptible of such definite proof, are held to come within the rule of the statute; upon the ground, that such evidence ought not to be allowed merely because its quantity

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Payne, R. 375; *Gosbell v. Archer*, 4 Nev. & Man. R. 485; *Hinde v. Whitehouse*, 7 East, R. 568; *Lent v. Padelford*, 10 Mass. R. 230; *Phillimore v. Barry*, 1 Camp. R. 513; *Coldham v. Showler*, 10 Jurist, 552.

<sup>1</sup> 2 Stark. Ev. and cases cited; *Johnson v. Dodgson*, 2 Mees. & Welsb. R. 653.

<sup>2</sup> *Kaine v. Old*, 2 Barn. & Cres. R. 627; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. R. 280; *Abeel v. Radcliffe*, 13 Johns. R. 297; *Goss v. Nugent*, 5 Barn. & Ad. R. 58; *Stowell v. Robinson*, 3 Bing. N. S. R. 928; *Harvey v. Grabham*, 5 Ad. & Ell. R. 61; 2 Kent, Comm. Lect. 39, p. 498 and 511; *Ford v. Yates*, 2 Mann. & Grang. R. 549. See *Sivewright v. Archibald*, 6 Eng. Law & Eq. R. 286.

<sup>3</sup> *Cooper v. Smith*, 15 East, R. 103; *Richards v. Porter*, 6 Barn. & Cres. R. 437; *Smith v. Surman*, 9 Barn. & Cres. R. 561.

<sup>4</sup> *Kenworthy v. Schofield*, 2 B. & Cres. R. 945; *Walker v. Constable*, 1 Bos. & Pul. R. 306; *Buckmaster v. Harrop*, 13 Ves. R. 456.

would tend to render the perjury less frequent; for a door would thereby be opened to an indefiniteness of construction, and an uncertainty of practice, which would render the statute more mischievous than beneficial.<sup>1</sup> Still, however, if the words used in the contract have acquired a technical sense; or, if the usage of trade have assigned to them a particular meaning, parol evidence may be given, to ascertain and explain the sense in which they are used.<sup>2</sup>

§ 786. In regard to the authority of the agent, it is sufficient that he be recognized as such by the parties for whom he acts. He must, however, be a third person.<sup>3</sup> An auctioneer, or a broker, is, therefore, considered as the agent of both parties, and binds them, by an entry of the contract in his books; or by the bought and sold notes, which he delivers, if they correspond.<sup>4</sup> But if there be any contradiction, or material difference between the bought and sold notes, which a broker delivers, they do not constitute a sufficient memorandum.<sup>5</sup> Thus, where a bought note described a certain article which had been sold as "Riga Rhine hemp," and the sold note described it as "St. Petersburg clean hemp," it was held that the notes did not indicate the same bargain, the one article being much better than the other, and that they were not a

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<sup>1</sup> *Hinde v. Whitehouse*, per Ld. Ellenborough, 7 East, R. 568; *Powell v. Edmunds*, 12 East, R. 6, 7; *Blagden v. Bradbear*, 12 Ves. R. 472.

<sup>2</sup> *Birch v. Depeyster*, 4 Camp. R. 385; *Phillips & Amos on Evid.* p. 738, 739, ed. 1838; *Johnston v. Usborne*, 11 Adolph. & Ell. R. 549.

<sup>3</sup> *Wright v. Dannah*, 2 Camp. R. 203; *Sewall v. Fitch*, 8 Cow. R. 215.

<sup>4</sup> *Emmerson v. Heelis*, 2 Taunt. R. 38, overruling *Stansfield v. Johnson*, 1 Esp. R. 101; *Bird v. Boulter*, 4 B. & Ad. R. 443; *Frost v. Hill*, 3 Wend. R. 386; *White v. Proctor*, 4 Taunt. R. 209; *Rucker v. Cammeyer*, 1 Esp. R. 105; *Chapman v. Partridge*, 5 Esp. R. 256; *Boorman v. Jenkins*, 12 Wend. R. 566.

<sup>5</sup> *Grant v. Fletcher*, 5 Barn. & Cres. R. 437; *Hinde v. Whitehouse*, 7 East, R. 569; *Cumming v. Roebuck*, Holt, N. P. C. R. 173; *Heyman v. Neale*, 2 Camp. R. 337; *Thornton v. Charles*, 9 Mees. & Welsb. R. 809; *Gregson v. Ruck*, 4 Adolph. & Ell. N. S. R. 747.

sufficient memorandum to bind the parties.<sup>1</sup> But a mere formal and unimportant difference will not destroy the effect of the notes as constituting a memorandum of the contract.<sup>2</sup> If the notes agree together, but differ from the entry of the broker in his books, the notes are to be taken as the memorandum, and they are not considered as affected by the entry.<sup>3</sup>

§ 787. Executory contracts for the future delivery of goods, existing at the time of the sale, are within the statute of frauds. But executory contracts for the delivery of goods, after they shall be manufactured, or after certain work and labor shall be expended upon them, are not within the statute.<sup>4</sup> In all cases of executory contracts the question is whether it be for the hire of labor and services, or a simple contract of sale. And although the distinction is practically very difficult in many cases, it is clearly laid down. Accordingly, it has been held, that a contract for articles not in existence, is a contract of sale, when the seller is not the manufacturer, but is expected to procure them for the buyer.<sup>5</sup> This rule

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<sup>1</sup> *Thornton v. Kempster*, 5 *Taunt.* R. 786.

<sup>2</sup> *Maclean v. Dunn*, 1 *Moore & Payne*, R. 778.

<sup>3</sup> *Hawes v. Forster*, 1 *Mood. & Rob.* R. 368; *Goom v. Affalo*, 6 *Barn. & Cres.* R. 117. See *Sivewright v. Archibald*, 6 *Eng. Law & Eq.* R. 286.

<sup>4</sup> *Rondeau v. Wyatt*, 2 *H. Black.* R. 63. The cases, which at first appear contradictory, are easily explained by the distinction in the text, which is recognized in all the late cases. The first case on this subject, namely, *Towers v. Osborne*, Str. R. 506, was a contract for the manufacture of a chariot, which was held not to be within the statute. So, also, in *Clayton v. Andrews*, 4 *Burr.* R. 2101, the contract was for the delivery of wheat, after it should be threshed; which was a contract for labor and services, and held not to be within the statute. See Lord Kenyon's remarks on *Cooper v. Elston*, 7 *T. R.* 14; *Garbutt v. Watson*, 5 *Barn. & Ald.* R. 613; *Smith v. Surman*, 9 *B. & C. R.* 561; *Bennett v. Hull*, 10 *Johns.* R. 364; *Crookshank v. Burrell*, 18 *Johns.* R. 58; *Watts v. Friend*, 10 *B. & C. R.* 446; *Sewall v. Fitch*, 8 *Cow.* R. 215; *Jackson v. Covert*, 5 *Wend.* R. 139; 2 *Kent, Comm. Lect.* 39, p. 511, note b.

<sup>5</sup> *Garbutt v. Watson*, 5 *Barn. & Ald.* R. 613; *Lamb v. Crafts*, 12 *Metcalf*, R. 356; *West Middlesex Waterworks Co. v. Suwerkropp*, 1 *Mood. & Mal.* R. 408; *Watts v. Friend*, 10 *Barn. & Cres.* R. 446. See post, § 1015 b.

has also been held to apply to cases where the seller himself was the manufacturer, provided the contract be clearly not to manufacture, but to sell and deliver articles which he is in the habit of manufacturing at a specified time and for a specified price.<sup>1</sup> This application of the rule seems however not to be supported by the weight of authority,<sup>2</sup> and the

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<sup>1</sup> *Gardner v. Joy*, 9 Metcalf, R. 177; *Spencer v. Cone*, 1 Metcalf, R. 283. In *Lamb v. Crafts*, 12 Metcalf, R. 356, Mr. Ch. Justice Shaw, in delivering the opinion of the court, says: "It was intimated, but not pressed, that this case was not within the statute of frauds, because the tallow was to be prepared or manufactured. But we think it very clear that this objection cannot prevail. The distinction, we believe, is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." See *Courtright v. Stewart*, 19 Barbour, R. 455; *Waterman v. Meigs*, 4 Cushing, R. 497; *Watts v. Friend*, 10 Barn. & Cres. R. 446; *Cason v. Cheely*, 6 Georgia R. 554; *Bird v. Muhlenbrink*, 1 Richard. R. 199.

<sup>2</sup> *Rondeau v. Wyatt*, 2 H. Bl. R. 63; *Cooper v. Elston*, 7 T. R. 14; *Smith v. Surman*, 9 Barn. & Cres. R. 561; *Bennett v. Hull*, 10 Johns. R. 364; *Crookshank v. Burrell*, 18 Johns. R. 58; *Mixer v. Howarth*, 21 Pick. R. 205; *Garbutt v. Watson*, 5 Barn. & Ald. R. 613; *Eichelberger v. McCauley*, 5 Harr. & Johns. R. 213; *Bronson v. Wiman*, 10 Barb. S. C. R. 406; *Sewall v. Fitch*, 8 Cow. R. 215. In *Robertson v. Vaughn*, 5 Sandf. R. 1, where the defendant made a contract with the plaintiff to make and deliver to him at a specified time, one thousand molasses shooks and heads, it was held to be a contract for labor and services and not of sale. Duer, J., said: "We certainly think that this case is within the mischief that the statute of frauds was designed to prevent, and that the contract between the parties was substantially a contract for the sale of goods and merchandise, and not for work and labor; but we cannot shut our eyes to the fact, that the case of *Sewell v. Fitch*, (8 Cowen, R. 215,) as the counsel for the defendant found himself under the necessity of admitting, is not distinguishable from the present; and that no conflicting decisions are to be found in our own Reports. The contract, which the supreme court, in that case, held to be not within the statute, bore an entire analogy to that between the parties now before us, with the single exception, that it related to nails instead of shooks. It is true, that it would not be easy to reconcile *Sewell v. Fitch* with the cases in England and in Massachusetts to which we were referred; but for more than twenty years, it has been considered as evidence of the law in this State, and as such, has doubtless been followed in numerous instances."

fact that a statute has been lately passed in England,<sup>1</sup> extending the provisions of the statute of frauds to executory

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by inferior tribunals. Under these circumstances, we think that it belongs only to the court of ultimate jurisdiction to set aside the authority of the decision and correct the error which it probably involves. If all contracts between merchants and manufacturers for the purchase of goods, *to be thereafter manufactured*, are to be excepted from the statute of frauds, there seems to be little reason for retaining at all those provisions of the statute which relate to the sale of goods to be delivered on a future day, since it is hardly possible to imagine an exception more arbitrary in its nature, and more contrary to policy upon which the statute is admitted to be founded. Such an exception, embracing as it does a very large class of cases, frequently of great amount in value, is, in its principle, equivalent to a repeal; and either the law itself should be abolished, as imposing a needless restraint upon the transactions of business, or, if the sound policy of the law must be admitted, an exception repugnant to its spirit and destructive of utility should no longer be permitted to exist. A new statute, similar to 9 Geo. IV. c. 14, (a), seems to be required, and should the attention of the legislature be directed to the subject, would probably be passed; but we are not legislatures, and as judges, must administer the law as we find it established."

In *Hight v. Ripley*, 19 Maine R. 137, where the defendants agreed with the plaintiff "to furnish as soon as practicable 1,000 or 1,200 pounds of malleable hoe-shanks agreeable to pattern left with them," the court held the contract not to be within the statute, because it was a contract for the manufacture of the articles. Shepley, J., said: "It may be considered as now settled, that the statute of frauds embraces executory as well as executed contracts for the sale of goods. But it does not prevent persons from contracting verbally for the manufacture and delivery of articles. The only difficulty now remaining is, to decide whether the contract be one for sale, or for the manufacture and delivery of the article. It may provide for the application of labor to materials already existing partially or wholly in the form designed, and that the article improved by the labor shall be transferred from one party to the other. In such cases there may be difficulty in ascertaining the intentions, and the distinction may be nice, whether it be a contract for sale or for manufacture. The decision in the case of *Towers v. Osborne*, 1 Stra. R. 506, is esteemed to have been correct, while the reasons for it are rejected as erroneous. The chariot bespoken does not appear to have existed at the time, but to have been manufactured to order. In *Garbutt v. Watson*, 5 B. & Ald. R. 613, the contract was 'for the sale of one hundred sacks of flour at 50s. per sack, to be got ready by the plaintiff to ship to the defendant's order, free on board, at

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<sup>1</sup> 9 Geo. 4, ch. 14, § 7.

contracts, "notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery," seems to show that the original statute did not apply to such cases.

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Hull within three weeks.' There was an attempt to exclude it from the statute, because the plaintiffs were millers, and had not the flour then ground and prepared for delivery. But the contract did not provide, that they should manufacture the flour; they might have purchased it from others, and have fulfilled all its terms. It was decided to be a contract for sale. It cannot be material whether the article be then in the possession of the seller, or whether he afterward procure or make it. A contract for the manufacture of an article, differs from a contract of sale in this; the person ordering the article to be made is under no obligation to receive as good or even a better one of the like kind purchased from another and not made for him. It is the peculiar skill and labor of the other party combined with the materials for which he contracted, and to which he is entitled. Hence, it has been said that if the article exist at the time in the condition in which it is to be delivered, it should be regarded as a contract for sale. In *Crookshank v. Russell*, 18 Johns. R. 58, the contract was, that the defendant should make the wood work of a wagon for the plaintiff by a certain time; and it was decided not to be a contract for sale. In the case of *Mixer v. Howarth*, 21 Pick. R. 205, the contract was, that the plaintiff should finish for the defendant a buggy, then partly made; and it was decided not to be a contract for sale. The contract in this case provides that the defendants should 'furnish as soon as practicable 1,000 or 1,200 pounds of malleable hoe-shanks agreeable to patterns left with them.' They were to be 'delivered at their furnace.'

"There is a provision, that the defendants may 'immediately receive orders for a larger amount, say 2,000 pounds more than heretofore stated,' and that 'the whole amount is (in such cases) to be charged at' a diminished price. Taking into consideration all the provisions of the contract, there can be little doubt, that it was the intention of the parties, that the defendants should manufacture the shanks at their furnace agreeably to certain patterns, which had been left with them. There is no evidence in the case tending to prove that the articles were then existing in the form of the pattern. It may be fairly inferred, that they were not, but were to be made 'as soon as practicable.' The testimony presented does not then prove a contract for the sale of goods, but rather one for the manufacture of certain articles of a prescribed pattern by order of the plaintiff." See, also, *Downs v. Ross*, 23 Wend. R. 270.

§ 788. Secondly. We now come to the second exception mentioned in the statute, namely, the giving something in earnest, to bind the bargain. And, in this connection, the only material rule to be stated is, that there should be an actual payment of a portion of the price, in order to satisfy the terms of the statute. The mere act of drawing a shilling across the hand of the seller, without allowing him to retain it, which is called, in the north of England, "striking a bargain," is not sufficient.<sup>1</sup> The practice of ratifying a contract of sale, by some formal act, which should be typical of the conclusive assent of both parties, is recorded in the most ancient annals of history. In Ruth,<sup>2</sup> we read, that amongst the Jews "it was the manner to confirm all things, for a man to pluck off his shoe, and give it to his neighbor; and this was a testimony in Israel." In the same manner was the contract of sale between Boaz and Elimelech ratified.<sup>3</sup> So, also, the northern nations confirmed their contracts, by shaking hands; and this practice still exists in England and America, and is recognized by the Roman and the common law.<sup>4</sup> Earnest is only a ratification of the contract, however, and gives the buyer a conditional right to the goods, upon payment of the whole price. But if he do not, within a reasonable time, pay for and take the goods, the vendor may resell them to another person.<sup>5</sup> So, if a time and place be appointed for payment, and the buyer do not attend at such time and place, the seller may also resell, although earnest be given.<sup>6</sup>

§ 789. The civil law recognized two kinds of earnest; the

<sup>1</sup> Blenkinsop *v.* Clayton, 7 Taunt. R. 597.

<sup>2</sup> Ruth, iv. 7.

<sup>3</sup> Ruth, iv. 8, 9.

<sup>4</sup> Bracton, l. 2, c. 27; Inst. l. 3, tit. 24.

<sup>5</sup> Langfort *v.* Tiler, 1 Salk. 113; Goodall *v.* Skelton, 2 H. B. R. 316. But see Greaves *v.* Ashlin, 3 Camp. R. 426.

<sup>6</sup> Neil *v.* Cheves, 1 Bailey, So. Car. Rep. 537.

one of which was a gage, by way of assurance; and the other was a deposit as part payment. The former only is earnest by our law; for the statute expressly distinguishes between it and part payment.<sup>1</sup>

§ 790. Thirdly. We come next to the first exception of the statute, which is, "that the buyer shall accept part of the goods so sold, and actually receive the same." The meaning to be attached to the terms "accept" and "actually receive," is, that the purchaser must finally appropriate to himself the whole or a part of the goods.<sup>2</sup> To create such an appropriation as that contemplated in the statute, there must be not only such an actual delivery by the seller as to destroy all further claim of lien, or of stoppage *in transitu* on his part; but also such an actual acceptance by the buyer, as to disable him from objecting to the quantity or the quality of the goods.<sup>3</sup>

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<sup>1</sup> Code Civile, 1590. The Italian custom to pay a *caparra* to the *vetturino* when the bargain is made for his *vettura*, is precisely a case of payment of earnest. The *caparra* is any current coin, and may be of the smallest value, although ordinarily a *scudo* is paid. After it is given, the *vetturino* considers himself and the other party bound to the bargain.

" And it has been thought that the delivery must precede the acceptance. Saunders *v.* Topp, 4 Exch. R. 390.

<sup>3</sup> Smith *v.* Surman, 9 Barn. & Cres. 561; Norman *v.* Phillips, 14 Mees. & Welsb. 277; Howe *v.* Palmer, 3 Barn. & Ald. 321; Curtis *v.* Pugh, 10 Q. B. 111; Outwater *v.* Dodge, 6 Wend. 397; Percival *v.* Blake, 2 Car. & Payne, 514; Bill *v.* Bament, 9 Mees. & Welsb. R. 40, and other cases cited below. See, however, Morton *v.* Tibbett, 15 Adolph. & Ell. n. s. 428. In this case an action was brought to recover the price of fifty quarters of wheat. It appeared that the plaintiff sold the wheat by sample to the defendant, who said he would send one Edgley, a general carrier and lighterman, on the following morning to receive the residue of the wheat in a lighter, for the purpose of conveying it by water from March, where it then was, to Wisbeach; and the defendant himself took the sample away with him. On 26th August, Edgley received the wheat accordingly. On the same day the defendant sold the wheat, at a profit, by the same sample, to one Hampson at Wisbeach market. The wheat arrived at Wisbeach in due course on the evening of Monday, the 28th August, and was tendered by Edgley to Hampson on the following morning, when he refused to take it, on the ground that it did not correspond

If, therefore, the vendor still retain a right of lien, or of stoppage *in transitu*, or if the vendee may still object to

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with the sample. Up to this time the defendant had not seen the wheat, nor had any one examined it on his behalf. Notice of Hampson's repudiation of his contract was given to the defendants; and the defendant, on Wednesday the 30th August, sent a letter to the plaintiff repudiating his contract with the plaintiff on the same ground. There was no memorandum in writing, and it was objected that there was no evidence of acceptance and receipt to satisfy the requisitions of the statute of frauds. Pollock, C. B., however, overruled the objection, and a verdict was found for the plaintiff. A motion being made to enter a nonsuit, the case came up for trial before the Queen's Bench; and Lord Campbell said:—

"In this case the question submitted to us is, whether there was any evidence on which the jury could be justified in finding that the buyer accepted the goods and actually received the same, so as to render him liable as buyer, although he did not give any thing in earnest to bind the bargain, or in part payment, and there was no note or memorandum in writing of the bargain.

"It would be very difficult to reconcile the cases on this subject; and the differences between them may be accounted for by the exact words of the 17th section of the Statute of Frauds not having been always had in recollection. Judges, as well as counsel, have supposed that, to dispense with a written memorandum of the bargain, there must first have been a receipt of the goods, by the buyer, and, after that, an actual acceptance of the same. Hence, perhaps, has arisen the notion that there must have been such an acceptance as would preclude the buyer from questioning the quantity or quality of the goods, or in any way disputing that the contract has been fully performed by the vendor. But the words of the act of parliament are; [here he recited them]. It is remarkable that, notwithstanding the importance of having a written memorandum of the bargain, the legislature appears to have been willing that this might be dispensed with, where by mutual consent there has been part performance. Hence the payment of any sum in earnest to bind the bargain, or in part payment is sufficient. This act on the part of the buyer, if acceded to on the part of the vendor, is sufficient. The same effect is given to the corresponding act by the vendor of delivering part of the goods sold to the buyer, if the buyer shall accept such part and actually receive the same. As part payment, however minute the sum may be, is sufficient. This shows conclusively that the condition imposed was not the complete fulfillment of the contract to the satisfaction of the buyer. In truth, the effect of fulfilling the condition is merely to waive written evidence of the contract, and to allow the contract to be established by parol as before the Statute of Frauds passed. The question may then arise, whether it has been performed

the quantity or quality of the goods, the delivery and acceptance are not such as to satisfy the requisitions of the

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either on the one side or the other. The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined. As the act of parliament expressly makes the acceptance and actual receipt of any part of the goods sold sufficient, it must be open to the buyer to object at all events to the quantity and quality of the residue, and, even where there is a sale by sample, that the residue offered does not correspond with the sample. We are, therefore, of opinion that, whether or not a delivery of the goods sold to a carrier or any agent of the buyer, is sufficient; still there may be an acceptance and receipt within the meaning of the act, without the buyer having examined the goods or done any thing to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled. We are, therefore, of opinion in this case that, although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to Edgley was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it." His Lordship then proceeded to examine the cases, and the result of his opinion was, "that there may be an acceptance and receipt of goods by a purchaser within the Statute of Frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond to the contract."

This statement, however, is in direct conflict with the doctrine as laid down in the cases above cited, and particularly in that of *Smith v. Surman*, 9 B. & C. R. 577, wherein Baron Parke said: "The later cases have established that unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity and quality of the goods, or to deprive the seller of his right of lien, there cannot be any part acceptance." And that of *Hansom v. Armitage*, 5 Barn. & Ald. R. 557, in which Baron Alderson says: "The true rule appears to me to be, that acceptance and delivery under the Statute of Frauds means such an acceptance as precludes the purchaser from objecting to the quality of the goods." The same doctrine is laid down in *Howe v. Palmer*, 3 Barn. & Ald. R. 321, by Abbott, C. J. In the subsequent case of *Hunt v. Hecht*, 20 Eng. Law & Eq. R. 524, the case of *Morton v. Tibbett* did not obtain the full approval of the court. Martin, B., said: "The question is, whether the defendants accepted part of the goods sold, and actually received the same. The contract was for such bones in the

statute.<sup>1</sup> The delivery must be a complete and final delivery; and the acceptance an ultimate acceptance, so as to reduce the goods to the actual possession of the vendee.<sup>2</sup> It follows, therefore, that no receipt of goods by a carrier, or middleman, on their way to the buyer, is a sufficient acceptance,<sup>3</sup> unless such a carrier, or middleman, be the general agent of the vendee, having authority finally to accept them.

§ 791. With regard to part-acceptance, where a sample is delivered to the purchaser, it will be a sufficient acceptance to satisfy the statute, if it be understood by both parties, that the sample forms a part of the whole quantity purchased;<sup>4</sup> and

heap as were ordinarily merchantable, and they were only bound to accept such merchantable bones. Directions were, no doubt, given to the wharsinger to receive the bones, and in one sense they were received, but this was not an acceptance within the statute. There is no acceptance unless the purchaser has exercised his option, or has done something that has deprived him of his option. *Morton v. Tibbett* is a correct decision, because the purchaser had there dealt with the goods as his own, but much that is said in that case may be open to doubt. The decisions, in my opinion, show that the acceptance must be after the purchaser has exercised his option, or has done something to preclude himself from doing so." See, also, *Shindler v. Houston*, 1 Denio, R. 48; 1 Comst. R. 261; *Meredith v. Meigh*, 2 El. & Bl. R. 364; s. c. 22 Eng. Law & Eq. R. 91.

<sup>1</sup> *Maberley v. Sheppard*, 3 Moor. & S. R. 442; s. c. 10 Bing. R. 99. See post, § 1015 y; *Bushell v. Wheeler*, 69 Eng., Com. Law R. 441 note; *Thompson v. Trail*, 6 Barn. & Cres. 36; *Coats v. Chaplin*, 3 Q. B. 483.

<sup>2</sup> *Baldey v. Parker*, 2 Barn. & Cres. 44; *Phillips v. Bistolli*, 2 Barn. & Cres. R. 513; *Smith v. Surman*, 9 Barn. & Cres. R. 561; *Carter v. Toussaint*, 5 B. & Ald. R. 858; *Kent v. Huskinson*, 3 B. & P. R. 233; *Hanson v. Armitage*, 5 B. & Ald. R. 557.

<sup>3</sup> *Astey v. Emery*, 4 Maule & Selw. R. 264; *Hanson v. Armitage*, 5 B. & Ald. R. 559; *Howe v. Palmer*, 3 B. & Ald. R. 321; *Johnson v. Dodgson*, 2 Mees. & Welsb. R. 650; *Farina v. Home*, 16 Mees. & Welsb. R. 119; *Meredith v. Meigh*, 22 Eng. Law & Eq. R. 91; *Morgan v. Sykes*, 3 Q. B. Rep. 486; *Morton v. Tibbett*, 15 Q. B. Rep. 428; *Bushell v. Wheeler*, Ibid. 442.

<sup>4</sup> *Hinde v. Whitehouse*, 7 East, R. 558; *Klinitz v. Surry*, 5 Esp. R. 267; *Talver v. West, Holt*, R. 178.

not otherwise.<sup>1</sup> Where several different articles are purchased at one time, and in the course of one continuous transaction, the contract is to be treated as entire under the statute, as we have seen; and therefore if any of these articles be received, it will, of course, be considered as a part acceptance of the whole, so as to take the case out of the statute.<sup>2</sup> But where an order is given for two distinct articles at the same time, and the order for one is absolute, and for the other is conditional on its proving satisfactory, they will be considered as constituting two distinct contracts, and the acceptance of one will not take the other out of the statute.<sup>3</sup>

§ 792. The distinction between a mere delivery and the acceptance required by the statute, must be strictly kept in mind. A delivery sufficient to vest the title to the property in the vendee will not always be sufficient to deprive the vendor of his lien for the price, nor to deprive the vendee of his right to object to the nature and quality of the goods;<sup>4</sup> and therefore will be no acceptance within the statute. Thus, although, if certain goods be marked, and set aside, in pursuance of the order of the vendee, it will vest a right to the property in him, so that, if they be lost, it will be his loss; yet if a time be fixed for payment, this will not take the case out of the statute, inasmuch as the vendee has still a right to object to the goods,<sup>5</sup>

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<sup>1</sup> *Cooper v. Elston*, 7 T. R. 14; 1 Bell, Comm. 182; 2 Kent, Comm. Lect. 39, p. 501.

<sup>2</sup> *Elliott v. Thomas*, 3 Mees. & Welsb. R. 176; *Rhode v. Thwaites*, 6 Barn. & Cres. R. 388; *Scott v. Eastern Counties Railway Co.* 12 Mees. & Welsb. R. 38.

<sup>3</sup> *Price v. Lea*, 1 Barn. & Cres. R. 158.

<sup>4</sup> *Miles v. Gorton*, 2 Cromp. & Meeson, R. 504; 4 Tyrwh. R. 295; *Townley v. Crump*, 5 Nev. & M. R. 608; *Bloxam v. Sanders*, 4 B. & C. R. 941; *Winks v. Hassall*, 9 B. & C. R. 375; *Rhode v. Thwaites*, 6 Barn. & Cress. R. 388; *Tarling v. Baxter*, Ib. 360; *Baldey v. Parker*, 2 Barn. & Cress. R. 44. See post, § 1015 *g.*

<sup>5</sup> *Kent v. Huskinson*, 3 B. & P. 233; *Astey v. Emery*, 4 M. & S. R. 262;

and the vendor has still a lien, and right of stoppage *in transitu*. So, also, when no time of payment is fixed, the mere marking and setting aside of the property will constitute no acceptance within the statute.<sup>1</sup> Thus, where the defendant gave a verbal order to the agent of the plaintiff, for a quantity of goods, at a stipulated price, to be paid for on delivery, and on receiving notice of the arrival of the goods at the agent's warehouse, he went there and ordered a boy to affix marks to them, and to send them to the St. Catherine's docks, and the next day an invoice was delivered to the defendant, charging the articles at 12*s.* each, upon which he repudiated the whole transaction, and refused to take the goods, it was held, that there had been no acceptance within the meaning of the statute.<sup>2</sup> But if by the terms of the sale, it be agreed that the article bought shall be paid for on delivery, the payment of the price, without objection, would show a sufficient delivery within the statute.<sup>3</sup>

§ 792 a. A merely symbolical transfer of property is sufficient under the statute, when it is intended to give all the possession which is possible, and when the goods are not left in the possession of the vendor. If, therefore, the goods sold be in the docks, the transfer in the dock books with the assent of all parties would be symbolical, and sufficient completely to trans-

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Anderson *v.* Hodgson, 5 Price, R. 630; Stark. Ev. 611; Howe *v.* Palmer, 3 B. & Ald. R. 321.

<sup>1</sup> Carter *v.* Toussaint, 5 B. & Ald. R. 858; Howe *v.* Palmer, 3 B. & Ald. R. 321; Proctor *v.* Jones, 2 Car. & Payne, R. 532; Baldey *v.* Parker, 2 Barn. & Cress. R. 44; Belcher *v.* Capper, 5 Scott, (N. S.) R. 315; Hunt *v.* Hecht, 20 Eng. Law & Eq. R. 524.

<sup>2</sup> Bill *v.* Bament, 9 Mees. & Welsb. R. 40, 41. In this case, Mr. Baron Parke said: "To take the case out of the 17th section of the act, there must be both *delivery* and *acceptance*, and to constitute a delivery, the possession must have been parted with by the owner so as to deprive him of the right of lien." And see Holmes *v.* Hoskins, 28 Eng. Law & Eq. R. 561. Farina *v.* Home, 16 Mees. & Welsb. R. 119.

<sup>3</sup> Aguirre *v.* Allen, 10 Barb. R. 76.

fer the possession.<sup>1</sup> So, also, the giving of the key of a warehouse, in which the goods lay, would be such a transfer of the possession as to satisfy the statute.<sup>2</sup> But no merely symbolical or constructive delivery will satisfy the statute, unless it be of such a character as unequivocally to place the property within the power and under the exclusive dominion of the buyer.<sup>3</sup>

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<sup>1</sup> *Shindler v. Houston*, 1 Denio, 48; *Harman v. Anderson*, 2 Camp. R. 243. See, also, *Farina v. Home*, 16 Mees. & Welsb. R. 119. See post, p. 298, note 1.

<sup>2</sup> *Wilkes v. Ferris*, 5 Johns. R. 335; *Chappel v. Marvin*, 2 Aik. R. 79.

<sup>3</sup> *Shindler v. Houston*, 1 Comst. R. 261. In this case Wright, J., delivering the judgment of the Court of Appeals, reversing the judgment of the Supreme Court, thus clearly lays down the rule:—"It is to be regretted that the plain meaning of the statute should ever have been departed from, and that any thing short of an actual delivery and acceptance should have been regarded as satisfying its requirements, when the memorandum was omitted; but another rule of interpretation, which admits of a constructive or symbolical delivery, has become too firmly established now to be shaken. The uniform doctrine of the cases, however, has been, that in order to satisfy the statute, there must be something more than mere words—that the act of *accepting* and *receiving* required to dispense with a note in writing, implies more than a simple act of the mind, unless the decision in *Elmore v. Stone*, 1 Taunt. R. 458, is an exception. This case, however, will be found upon examination to be in accordance with other cases, although the acts and circumstances relied on to show a delivery and acceptance, were extremely slight and equivocal; and hence the case was doubted in *Howe v. Palmer*, 2 B. & Ald. R. 324, and *Proctor v. Jones*, 2 C. & P. R. 534, and has been virtually overruled by subsequent decision. Far as the doctrine of constructive delivery has been sometimes carried, I have been unable to find any case that comes up to dispensing with all acts of parties, and rests wholly upon the memory of witnesses as to the *precise form of words* to show a delivery and receipt of the goods. The learned author of the Commentaries on American Law, cites from the Pandects the doctrine that the consent of the party upon the spot is a sufficient possession of a column of granite, which by its weight and magnitude, was not susceptible of any other delivery. But so far as this citation may be in opposition to the general current of decisions, in the common law courts of England and of this country, it is sufficient perhaps to observe that the Roman law has nothing in it analogous to our statute of frauds. In *Elmore v. Stone*, expense was incurred by direction of the buyer, and the vendor, at his suggestion, removed the horses out of the sale stable into another, and kept them at livery for him. In *Chaplin v. Rogers*, 1 East, R. 192, to which we were referred on the argument, the buyer sold part of the hay, which the pur-

Where, therefore, a bill of lading or receipt or order is delivered for goods in the possession of a wharfinger or bailee of any kind,

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chaser had taken away ; thus dealing with it as if it were in his actual possession. In the case of Jewett *v.* Warren, 12 Mass. R. 300, to which we were also referred, no question of delivery under the statute of frauds arose. The sale was not an absolute one, but a pledge of the property. The cases of Elmore *v.* Stone and Chaplin *v.* Rogers are the most barren of acts indicating delivery, but these are not authority — for the doctrine that words, *unaccompanied by acts* of the parties, are sufficient to satisfy the statute. Indeed, if any case could be shown which proceeds to that extent, and this court should be inclined to follow it, for all beneficial purposes, the law might as well be stricken from our statute-book ; for it was this species of evidence, so vague and unsatisfactory, and so fruitful of frauds and perjuries, that the legislature aimed to repudiate. So far as I have been able to look into the numerous cases that have arisen under the statute, the controlling principle to be deduced from them is, that when the memorandum is dispensed with, the statute is not satisfied with any thing but unequivocal acts of the parties ; not mere words, that are liable to be misunderstood, and misconstrued, and dwell only in the imperfect memory of witnesses. The question has been, not whether the words used were sufficiently strong to express the intent of the parties, but whether the acts connected with them, both of seller and buyer, were equivocal or unequivocal. The best considered cases hold that there must be a vesting of the possession of the goods in the vendee, as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal that he shall have precluded himself from taking any objection to the quantum or quality of the goods sold. But will proof of words alone show a delivery and acceptance from which consequences like these may be reasonably inferred ? Especially, if those words relate not to the question of delivery and acceptance, but to the contract itself ? A. and B. verbally contract for the sale of chattels for ready money ; and without the payment of any part thereof, A. says, ‘I deliver the property to you,’ or ‘It is yours,’ but there are no acts showing a change of possession, or from which the facts may be inferred. B. refuses payment. Is the right of the vendor, to retain possession as a lien for the price, gone ? Or, in the event of a subsequent discovery of a defect in the quantum or quality of the goods, has B. in the absence of all acts on his part showing an ultimate acceptance of the possession, concluded himself from taking any objection ? I think not. As Justice Cowen remarks, in the case of Artcher *v.* Zeh, 5 Hill, R. 205, ‘One object of the statute was to prevent perjury. The method taken was to have something done ; not to rest every thing on mere oral agreement.’ The acts of the parties must be of such a

it is held in the late cases, that there must be an agreement by the party having custody of the property, to hold it for the party receiving the bill of lading or order, and that the mere indorsement of it to the buyer is not enough.<sup>1</sup> But if the goods be put into the hands of a third person, as the bailee of the purchaser, it will be a sufficient delivery to satisfy the requisition of the statute; because the vendor thereby parts with all absolute right or claim over them, and the vendee abandons his right to reject them. Thus, where wool was bargained for, and it was agreed, that the buyer should remove it to the warehouse of a third person, in which he was accustomed to store his goods thus bought, and that it should be weighed, and packed, and remain there until paid for, and the wool was accordingly removed, weighed, and packed; it was held, that the vendor had no lien, but only a special interest; that the goods were in the vendee's possession, the warehouse being constructively his own warehouse; and that, therefore, they were sufficiently accepted within the meaning of the statute.<sup>2</sup> The mere payment of warehouse rent by the vendee,

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character as unequivocally to place the property within the power, and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit."

<sup>1</sup> *Farina v. Home*, 16 Mees. & Welsb. R. 119. In this case, where an order was given upon a wharfinger, Parke, B., said: "This warrant is no more than an engagement by the wharfinger to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignor (who is the vendor's agent), and his possession is that of the consignee, until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only is there a constructive delivery to him. In the meantime, the warrant, and the indorsement of the warrant, is nothing more than an offer to hold the goods as the warehouse-man of the assignee." See, also, *Bentall v. Burn*, 3 Barn. & Cres. R. 423; *Lackington v. Atherton*, 7 Man. & Grang. R. 360. But see *Hollingsworth v. Napier*, 3 Caines, R. 185; *Wilkes v. Ferris*, 5 Johns. R. 333; *Searle v. Keeves*, 2 Esp. R. 598; *Hammond v. Anderson*, 2 Camp. R. 243; *Withers v. Lyss*, 4 Camp. R. 237; *Tucker v. Ruston*, 2 Car. & Payne, 86.

<sup>2</sup> *Dodsley v. Varley*, 12 Ad. & Ell. R. 632. See also *Searle v. Keeves*, 2 Esp. N. P. C. 598.

is not, however, in itself, sufficient proof of such an acceptance as that required by the statute.<sup>1</sup> So, also, if a person proposing to buy goods, take them into his possession merely for the purpose of examination, or accept them on condition that he may return them, if they do not suit him, there is not a sufficient acceptance under the statute.<sup>2</sup> And the using of a small quantity of an article, taken on such condition, for the purpose of experiment, does not alter the case, and constitute a sufficient acceptance.<sup>3</sup>

§ 792 b. But where the property bargained for is left in the possession of the vendor, no merely constructive or symbolical delivery will be sufficient, unless, perhaps, under circumstances showing that he holds them as agent of the other party and has abandoned all claim to them of every kind,—as where he exercises rights of ownership over them, and sells or takes a portion of them away.<sup>4</sup> But such cases stand on peculiar and exceptional grounds, and are not readily admitted by the courts.<sup>5</sup> But in no case will a constructive delivery be inferred from mere words; and even though the goods be ponderous and not easily removed, the mere marking them and pointing them out is not sufficient. If, therefore, in a sale of lumber,

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<sup>1</sup> *New v. Swain*, Dan. & Lloyd, R. 193.

<sup>2</sup> *Kent v. Huskinson*, 3 Bos. & Pul. H. 233; *Jordan v. Norton*, 4 Mees. & Welsb. 155; *Percival v. Blake*, 2 Car. & Payne, 514.

<sup>3</sup> *Elliott v. Thomas*, 3 Mees. & Welsb. R. 177. And see *Cunliffe v. Harrison*, 5 Eng. L. & Eq. R. 539.

<sup>4</sup> *Chaplin v. Rogers*, 1 East, R. 192; *Vincent v. Germond*, 11 Johns. R. 283. But see *Thompson v. Maceroni*, 3 Barn. & Cres. R. 1; *Baldey v. Parker*, 2 Barn. & Cres. R. 37.

<sup>5</sup> *Shindler v. Houston*, 1 Denio, R. 48. See, also, *Carter v. Toussaint*, 5 Barn. & Ald. R. 855; *Tempest v. Fitzgerald*, 3 Barn. & Ald. R. 680. See Story on Sales, § 278. The case of *Elmore v. Stone*, 1 Taunt. R. 458, in which a horse was bought and allowed to remain in the possession of the vendor who removed him to another stable, and the possession was held to be sufficient to satisfy the statute, has not been upheld in subsequent cases—in fact it is said to be overruled in *Proctor v. Jones*, 2 Car. & Payne, R. 532. See *Bailey v. Ogden*, 3 Johns. R. 399; *Bentall v. Burn*, 3 Barn. & Cres. R. 423.

the vendor should set the portion purchased aside and measure it, and then pointing it out to the vendee, say, "The lumber is yours," and the vendee should accept, the statute would not be satisfied, although the risk and right of property would pass.<sup>1</sup>

§ 793. Whether the facts of the case, when uncontroverted, constitute an acceptance within the statute, is a matter of law for the court; but whether the party, by his acts, intended an acceptance, in point of fact, is a question for the jury.<sup>2</sup>

§ 793 a. Where a contract is made for the sale of an article of merchandise at a stipulated price, although it be void by the statute of frauds, (the acts of the parties not placing it within the exceptions,) yet if a subsequent delivery and acceptance be made, it operates to vivify the contract, and the price agreed upon may be recovered.<sup>3</sup> But the subsequent taking of mere earnest money would not seem to have the same effect.<sup>4</sup>

§ 794. This naturally brings us to the consideration of what constitutes a delivery of goods, according to the doctrine of the common law. But before treating of the subject of delivery, it will be proper to consider an intermediate right accruing to the seller, during the interval between the making of the contract of sale, and the delivery of the goods in pursuance thereof. This right is the seller's lien upon the goods for the price.

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<sup>1</sup> *Shindler v. Houston*, 1 Denio, R. 192; s. c. 1 Comstock, R. 261. See note 3, p. 296.

<sup>2</sup> 2 Stark. Ev. 611; *Hinde v. Whitehouse*, 7 East, R. 558; *Chaplain v. Rogers*, 3 East, R. 511; *Phillips v. Bistolli*, 2 Barn. & Cres. R. 511. See *Saunders v. Topp*, 4 Excheq. R. 390; *Morton v. Tibbett*, 15 Adolph. & Ell. (N. S.) R. 428; *Bushell v. Wheeler*, 15 Ibid. 442 n.

<sup>3</sup> *Sprague v. Blake*, 20 Wend. R. 61.

<sup>4</sup> *Ibid.*

## CHAPTER XVII.

## THE LIEN OF THE SELLER.

§ 795. A LIEN is a right to retain property, until some charge upon it is paid; and may be legal or equitable.<sup>1</sup> The seller's lien upon goods for their price is a legal lien, and is founded upon possession.<sup>2</sup> So soon, therefore, as the seller relinquishes the possession of the property, he loses his right of lien. Herein the seller's right of detaining the goods differs from his subsequent right of stopping them *in transitu* ;<sup>3</sup> for the latter right exists until they shall have arrived at their place of destination, and been transferred to the actual possession of the buyer.<sup>4</sup> Possession is the test of a right of lien. Non-delivery to the vendee is the test of a right of stoppage *in transitu*.

§ 796. The payment of the price is a condition precedent implied in the contract of sale, without which the vendor can neither take the goods, nor sue for them, unless a future day of payment be fixed in the contract; in which case, the seller

<sup>1</sup> 1 Story on Eq. Jurisp. § 506; 2 Ibid. § 1215.

<sup>2</sup> Lickbarrow v. Mason, 2 T. R. 63; 2 H. Bl. 357; Newsom v. Thornton, 6 East, R. 21; Cross on Lien, 322, 327.

<sup>3</sup> See McEwan v. Smith, 2 House of Lords Cases, 309; Jones v. Bradner, 10 Barb. R. 193.

<sup>4</sup> Cross on Lien, 5; Bloxam v. Sanders, 4 Barn. & Cres. R. 948; 7 Dowl. & Ryl. R. 396.

waives his lien, and the purchaser may take the goods when he pleases.<sup>1</sup> The seller has, however, a remedy by action against the buyer, in default of payment at the stipulated time.<sup>2</sup> But if the term allowed for payment elapse before delivery, the seller's right of lien revives.<sup>3</sup> So, if the buyer become insolvent before actual delivery, the seller regains his lien.<sup>4</sup>

§ 797. The delivery of a part of the goods will not destroy the vendor's right of lien over the remaining portion, although the contract be an entirety; for every portion of the goods sold is subject to the lien of the seller, so long as it remains in his actual possession.<sup>5</sup> A delivery of a part, where a contract is entire, may, indeed, operate to pass the title to the whole, if it be made with a view to the delivery of the whole, and with no intention to separate the part delivered from the part retained; but such a delivery will not destroy the lien of the vendor.<sup>6</sup> So, also, if there be a partial payment of the price, the seller's lien to

<sup>1</sup> *Coonley v. Anderson*, 1 Hill, R. 519.

<sup>2</sup> *Hammond v. Anderson*, 1 Bos. & P. New R. 69; *Bunney v. Poyntz*, 4 B. & Ad. R. 568; 1 Nev. & Man. R. 229; *Com. Dig. tit. Agreement*, B. 3; *Houlditch v. Desanges*, 2 Stark. R. 337; *Cross on Lien*, 328.

<sup>3</sup> *New v. Swain*, 1 Dan. & Lloyd, Merc. Cas. 193; *Dixon v. Yates*, 2 Nev. & M. R. 177.

<sup>4</sup> *Bloxam v. Sanders*, 4 Barn. & Cres. R. 948; *Tooke v. Hollingworth*, 5 T. R. 215; *Hanson v. Meyer*, 6 East, R. 614.

<sup>5</sup> *Miles v. Gorton*, 2 Cromp. & Mees. R. 504; *Payne v. Shadbolt*, 1 Camp. R. 427; *Bloxam v. Sanders*, 4 Barn. & Cres. R. 941.

<sup>6</sup> *Hammond v. Anderson*, 1 Bos. & P. New R. 69; *Bunney v. Poyntz*, 4 Barn. & Adolph. R. 568. In both of these cases, a particular examination will show that the vendor had no lien, and therefore that the decision only was that the delivery was sufficient to pass the title, or to avoid the statute. In both cases, a promissory note was given, and thereby the lien was waived. In the former case, there was also an accepted delivery order, which changed the possession of the whole. See, also, *Dixon v. Yates*, 5 Barn. & Ad. R. 339; *Payne v. Shadbolt*, 1 Camp. R. 427; *Rhode v. Thwaites*, 6 Barn. & Cres. R. 388; *Brewer v. Salisbury*, 9 Barbour, 511.

every part of the goods remains, and is reduced only in amount.<sup>1</sup>

§ 798. A principal has a lien on goods in the hands of his factor, and also in the hands of a person to whom the factor disposes of the goods, if he receive notice of the claim of the principal; but not otherwise.<sup>2</sup>

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<sup>1</sup> *Feise v. Wray*, 3 East, R. 102; *Hodgson v. Loy*, 7 T. R. 440.

<sup>2</sup> *Wright v. Campbell*, 4 Burr. R. 2051; 1 W. Black. R. 628; *Long on Sales*, Rand's ed. 264.

## CHAPTER XVIII.

## DELIVERY SUFFICIENT TO TRANSFER THE PROPERTY IN THE GOODS SOLD.

§ 799. WE come now to the question, what constitutes a sufficient technical delivery of the goods, so as to vest the right of property in the vendee. Delivery completes the contract of sale, and vests the title to the property sold in the vendee ; so that, if they be destroyed afterwards by any casualty, he must bear the loss. Delivery is as essential to a *gift* of personal property as to a sale ; and a verbal gift to one in possession does not pass the property.<sup>1</sup>

§ 800. The first rule of law applicable to delivery, and to which all other rules are subordinate, is, that no sale is complete, so as to vest an immediate right of property in the buyer, so long as any thing remains to be done, as between the buyer and seller.<sup>2</sup> The goods sold must be identified, separated, and distinguished from all other goods, or from the bulk and mass with which they are mixed.<sup>3</sup> Where goods are sold by number, weight, and measure, so long as the specific quantity or measure is not separated and identified, the sale is not com-

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<sup>1</sup> See *Shower v. Pilck*, 4 Exch. R. 477 ; *Withers v. Weaver*, 10 Barr, R. 391.

<sup>2</sup> See *Evans v. Harris*, 19 Barb. R. 416.

<sup>3</sup> *Austen v. Craven*, 4 Taunt. R. 644 ; *White v. Wilks*, 5 Ibid. 176 ; *Outwater v. Dodge*, 7 Cow. R. 85 ; *Woods v. McGee*, 7 Ohio R. 128 ; *Riddle v. Varnum*, 20 Pick. R. 280 ; *Hunter v. Hutchinson*, 7 Barr, R. 140.

pleted, and the goods are at the risk of the seller.<sup>1</sup> A mere assumption of ownership or control, by the purchaser, will not, however, be sufficient evidence of a delivery.<sup>2</sup> It merely affords a presumption of delivery, which may be rebutted by evidence of the refusal of the vendor to part with the goods until payment; which refusal may be either expressed, or implied from the terms of the bargain,<sup>3</sup> or the previous course of dealing between the parties.<sup>4</sup>

§ 800 a. But where the sale is completed, and the goods sold are separated from all others, and marked, and there remains nothing more for the seller to do in relation to them, the contract of sale becomes absolute, and no further delivery is required in order to pass the property.<sup>5</sup> So, also, where property sold is in the hands of a third person, and he agrees, at the instance of the vendor, to hold it in behalf of the vendee, the possession is changed, and no other delivery is necessary to throw the burden of loss on the vendee.<sup>6</sup> And if, in such case, the vendor give notice to the vendee that the goods are at his disposal, the bailee becomes the bailee of the ven-

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<sup>1</sup> *Whitehouse v. Frost*, 12 East, R. 614; *Hanson v. Meyer*, 6 East, R. 614; *Rugg v. Minett*, 11 East, R. 210; *White v. Wilks*, 5 Taunt. R. 176; *Zagury v. Furnell*, 2 Camp. R. 240; *Shepley v. Davis*, 5 Taunt. R. 617; *Busk v. Davis*, 2 M. & S. R. 397; *Simmons v. Swift*, 5 B. & C. R. 857; 8 D. & R. R. 693; *Elmore v. Stone*, 1 Taunt. R. 458; *Howe v. Palmer*, 3 B. & Ald. R. 321; *Withers v. Lys*, 4 Camp. R. 237; *Macomber v. Parker*, 13 Pick. R. 182; *Barnard v. Poor*, 21 Pick. R. 378; *Warren v. Buckminster*, 4 Foster, R. 342.

<sup>2</sup> *Tempest v. Fitzgerald*, 3 B. & Ald. R. 680, affirmed in *Holmes v. Hoskins*, 28 Eng. Law & Eq. R. 566; *Carter v. Toussaint*, 5 B. & Ald. R. 855; London Law Mag. vol. 4, p. 363, art. Mercantile Law; *Dole v. Stimpson*, 21 Pick. R. 384.

<sup>3</sup> *Tempest v. Fitzgerald*, 3 B. & Ald. R. 680; *Goodall v. Skelton*, 2 H. Black. R. 316.

<sup>4</sup> *Holderness v. Shackels*, 8 Barn. & Cres. R. 612; 1 Dan. & Lloyd, R. 203.

<sup>5</sup> *Wing v. Clark*, 24 Maine R. 366; *Houdlette v. Tallman*, 14 Maine R. 400; *Smith v. Nevitt, Walker*, R. 370; *Shindler v. Houston*, 1 Denio, R. 48.

<sup>6</sup> *Potter v. Washburn*, 13 Verm. R. 558; Post, § 805.

•• dec; and it is not necessary that a delivery order should be given.<sup>1</sup>

§ 800 b. Although the general rule is, that while any act remains to be done by the vendor in relation to the articles which are the subject of sale, the property does not pass to the vendee; yet this rule only obtains in the absence of any agreement to the contrary between the parties. And if the property sold be ready for delivery, and the payment of money, or the giving a security therefor, be not a condition precedent to the transfer, it may be the understanding of the parties, that a present interest should pass. In such case, the interpretation of the contract depends upon their intention; and it is a question for a jury to determine, under the circumstances, whether an absolute transfer was intended, and whether the remaining acts of the vendor were merely done for the purpose of ascertaining the price of the article sold at the rate agreed upon.<sup>2</sup>

§ 801. Where the seller has done every thing that is required of him, as to a portion of the goods, but something still remains to be done, before delivery, in regard to the rest, the goods wh ch have been separated, and designated, and are ready for delivery, become the property of the buyer, and are at his own risk; but the part in respect to which something remains to be done is at the risk of the seller, and as to them the sale is incomplete. Nor does it make any difference, in such a case, whether the contract be entire or severable. Thus, where a quantity of starch, in packages, was bought, and it was agreed that the different packages should be weighed by the seller, who accordingly weighed a portion of the starch, and delivered it to the vendee, and left a portion unweighed;

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<sup>1</sup> Wood v. Tassell, 6 Adolph. & Ell. (N. S.) R. 235; Magee v. Billingsley, 3 Ala. R. 679; Post, § 810 a.

<sup>2</sup> Riddle v. Varnum, 20 Pick. R. 283. See, also, Macomber v. Parker, 13 Pick. R. 182; Hawes v. Watson, 2 Barn. & Cres. R. 540; Downer v. Thompson, 6 Hill, R. 208; Houldlette v. Tallman, 14 Maine R. 400; Smyth v. Craig, 3 Watts & Serg. R. 14; Dennis v. Alexander, 3 Barr, R. 50.

and the vendee, in the mean time, became bankrupt; it was held, that the weighing and delivery of a part of the starch did not transfer to the vendee the property in that which was unweighed.<sup>1</sup> But in such a case, those goods only are at the risk of the buyer until payment, in respect to which the seller has performed all that is required of him.<sup>2</sup> Where the whole duty of the seller is completed, and nothing remains to be done by him, in relation to any part of the goods, a delivery of a part will be considered as a constructive delivery of the whole, whenever the contract of sale is *entire*.<sup>3</sup> So, also, although the contract be severable, the same rule governs, unless intention on the part of the seller to surrender only a *part* is either expressed, or manifestly implied, from the circumstances.<sup>4</sup>

§ 801 a. But where the terms of a contract of sale show an intention not to transfer the possession of property until after the performance of some act by the seller, and especially where a future time of delivery is fixed, the title does not pass until such act be performed, or until the time fixed for delivery. And although, where a specific chattel was sold for a fixed price, it being assumed to contain a certain quantity, and the price was paid, but by the terms of the contract the seller was to retain possession, carry the chattel to a certain place, there to deliver it at a certain time, and if upon admeasurement it was found to contain a larger quantity than what it had been assumed to contain, an additional price was to be paid at a fixed rate for the surplus, it was held that, until measurement

<sup>1</sup> *Hanson v. Meyer*, 6 East, R. 614. See *Rugg v. Minett*, 11 East, 210; *Simmons v. Swift*, 5 B. & Cres. R. 857.

<sup>2</sup> *Ibid.* 2 Black. Comm. 448; *Mason v. Thompson*, 18 Pick. R. 305.

<sup>3</sup> *Slubey v. Heyward*, 2 H. Bl. R. 504; *Hammond v. Anderson*, 4 B. & P. R. 69; *Sands v. Taylor*, 5 Johns. R. 395; *Smith v. Surman*, 9 B. & C. R. 561; *Shurtliff v. Willard*, 19 Pick. R. 202.

<sup>4</sup> *Dixon v. Yates*, 5 B. & Ad. R. 339; *Bunney v. Poyntz*, 4 B. & Ad. R. 568; *Payne v. Shadbolt*, 1 Camp. R. 427; *Crawshay v. Eades*, 1 B. & C. R. 181.

and actual delivery, the sale was incomplete, and that a loss which accrued in the interim was to be borne by the vendor.<sup>1</sup> So, also, where an executory contract of sale was made, as follows: "I, A. B., agree to purchase, and do hereby purchase, of T," a certain quantity of cheese, "if he makes as much," and certain cattle at fixed prices, T. "to keep the cattle on his farm, free of any expense, until foddering time, if there cannot be any sale made, that will answer before; the cheese to be kept till the first of November next, unless called for sooner; and for the payment of the amount of these articles, B. is to discharge all the claims he may have against T., and the balance he is to pay in cash whenever demanded;" it was held, that the property in the articles only passed as they were delivered, and that the property in the articles not delivered remained in T.<sup>2</sup>

§ 802. The duty of the seller, in respect to delivery, is often varied and extended by the custom of the trade.<sup>3</sup> Thus, it being the custom, in the sale of goat-skins, to count the number of skins in each bale,—where goat-skins were sold, and consumed by fire, before they were counted, the loss was held to be that of the seller.<sup>4</sup>

§ 803. When there is no agreement as to the time at which payment is to be made, the presumption is that payment and delivery are to be simultaneous; and the seller is not bound to deliver until payment is tendered.<sup>5</sup> But, if a particular time be agreed upon, or if the goods be sold upon credit, the

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<sup>1</sup> *Logan v. LeMesurier*, 11 Jurist, (Eng.) 1091. See, also, *Low v. Andrews*, 1 Story, R. 38.

<sup>2</sup> *Mason v. Thompson*, 18 Pick. R. 305. See, also, *Low v. Andrews*, 1 Story, R. 38; *Valentine v. Brown*, 18 Pick. R. 549.

<sup>3</sup> *Zagury v. Furnell*, 2 Camp. R. 240; *Goodall v. Skelton*, 2 H. Black. R. 316.

<sup>4</sup> *Zagury v. Furnell*, 2 Camp. R. 240.

<sup>5</sup> *N. Y. Firemen Ins. Co. v. De Wolf*, 2 Cow. R. 56.

property vests in the buyer, as soon as the seller has completely performed his part of the contract.<sup>1</sup> So, also, in the absence of any agreement as to the time of payment, if the goods be voluntarily delivered, without any fraudulent representation or inducement by the buyer, the absolute right of property thereby passes to the buyer. If, however, the goods be obtained fraudulently, as upon false pretences, the vendee thereby acquires no right to them.<sup>2</sup>

§ 804. Delivery may, however, be not only absolute, but conditional; and, in the latter case, the property will vest in the buyer, only upon his performance of the condition. If the condition be precedent, as if the seller agree to deliver the goods, upon his receiving a certain security, no property passes to the purchaser, until payment be made, or the security be given.<sup>3</sup> So, also, if the condition be subsequent, as if the seller part with the goods, upon the agreement, express or implied, that the purchaser shall furnish him a certain security in a few days, and with the understanding that such sale is conditional, the title, as between the parties themselves, will remain unchanged, until the security is given.<sup>4</sup> But, as to subsequent *bonâ fide* purchasers, or creditors of the vendee, without notice, the case may be different.<sup>5</sup> So, also, if the goods be delivered before the price is paid, in compliance with a usage of trade known to the buyer, the delivery is condi-

<sup>1</sup> 2 Kent, Comm. Lect. 39, p. 496; *Haswell v. Hunt*, cited by Buller, J., in 5 T. R. 231; *Harris v. Smith*, 3 Serg. & Rawle, R. 20; *Chapman v. Lathrop*, 6 Cow. R. 110.

<sup>2</sup> *Noble v. Adams*, 7 Taunt. R. 59.

<sup>3</sup> *Barrett v. Pritchard*, 2 Pick. R. 512; *Bishop v. Shillito*, 2 B. & Ald. R. 329 n.; *Hill v. Freeman*, 3 Cush. R. 257.

<sup>4</sup> See *Smith v. Lynes*, 1 Selden, R. 41; *Parris v. Roberts*, 12 Iredell, R. 268; *Buson v. Dougherty*, 11 Humph. R. 50; *Davis v. Bradley*, 24 Verm. R. 55; *Root v. Lord*, 23 Verm. R. 568; *Porter v. Pettengill*, 12 N. H. R. 299.

<sup>5</sup> *Hussey v. Thornton*, 4 Mass. R. 405; *Marston v. Baldwin*, 17 Ibid. 606; *Corlies v. Gardner*, 2 Hall, N. Y. S. C. Rep. 345; *Reeves v. Harris*, 1 Bailey, So. Car. R. 563; 2 Kent, Comm. Lect. 39, p. 497.

tional, and the vendee holds the goods in'lete, afor the vendor, until the condition is performed,<sup>1</sup> against all persons, except a *bonâ fide* purchaser, without notice.<sup>2</sup> Indeed, in all cases where credit is not given, or where the delivery is not intended by the parties to be absolute, a mere parting with the goods will not, of itself, constitute an absolute delivery.<sup>3</sup>

§ 805. A delivery may also be either actual or constructive. An actual delivery is a manual and immediate delivery of goods, which are in the possession of the seller. An actual delivery involves a consideration of the person to whom the goods are to be delivered, and the place in which they are to be delivered. *First*, as to the person. Delivery to the servant or agent of the buyer, or to a third person as a warehouseman, at the request of the buyer, is a good delivery to the buyer himself.<sup>4</sup> It must, however, clearly appear, not only that the bargain is completed, but that the third person is not acting merely as a depositary for the benefit of both parties to the contract. Thus, where an instrument bipartite, purporting to be an assignment of all the plaintiff's right in certain goods and debts to the defendant, was signed by the plaintiff and defendant, and by mutual consent was left in the hands of a third person, (it not distinctly appearing for what purpose,) there being no giving up of notes or adjustment of accounts, and the next day the depositary was forbidden by the plaintiff to surrender the instrument, it was held, that the facts did not

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<sup>1</sup> *Haggerty v. Palmer*, 6 Johns. Ch. R. 437; *Lord Seaforth's case*, 19 Ves. R. 235; *D'Wolf v. Babbett*, 4 Mason, R. 294.

<sup>2</sup> *Haggerty v. Palmer*, 6 Johns. Ch. R. 437; *Lord Seaforth's case*, 19 Ves. R. 235; 2 Kent, Comm. Lect. 49, p. 497; *Whitwell v. Vincent*, 4 Pick. R. 449; *D'Wolf v. Babbett*, 4 Mason, R. 294.

<sup>3</sup> *D'Wolf v. Babbett*, 4 Mason, R. 294; *Reed v. Upton*, 10 Pick. R. 522, and cases previously cited; *London Law Mag.* vol. 4, p. 363, article *Mercantile Law*; *White v. Wilks*, 5 Taunt. R. 176; *Simmons v. Swift*, 5 B. & C. R. 857.

<sup>4</sup> *Leeds v. Wright*, 3 B. & P. R. 320; *Dixon v. Baldwen*, 5 East, R. 175; *Bradford v. Marbury*, 12 Ala. R. 520.

show a delivery.<sup>1</sup> But if goods be delivered to a common carrier, either by land or by sea, it is a good delivery, so as to vest the property in the purchaser, to whom they are sent, and is subject only to the seller's right of stoppage *in transitu*, which will be hereafter considered. The carrier is, in fact, considered as the agent of the buyer, and not of the seller.<sup>2</sup> In such a case, the buyer only can sustain an action against the carrier, for loss or damage of the goods in the course of the conveyance, unless the seller specially agree with the carrier, to pay the freight of the goods; in which case, he also may have an action for non-delivery.<sup>3</sup> But so far as title is concerned, it matters not by which party freight is paid. If, by a special agreement, the seller take upon himself the risk of carriage, he will of course be responsible therefor.<sup>4</sup> So, if goods be sent for sale to the consignee, subject to his approval, the property remains at the risk of the seller, during their carriage to the consignee; and he must sue the carrier, if they be lost on the way.<sup>5</sup>

§ 806. If goods be sent by water, the vendor must use proper diligence in informing the vendee of the consignment;<sup>6</sup> and if it be customary among merchants for the seller to effect insurance upon such shipments, he must insure. So, also, the same rule applies, if it have been the usage between the parties to insure in former dealings; or if the vendor receive specific instructions to that effect; and the proof of such custom or

<sup>1</sup> Callender *v.* Colegreve, 17 Conn. R. 1.

<sup>2</sup> Dutton *v.* Solomonson, 3 Bos. & Pul. R. 584; Vale *v.* Bayle, Cowp. R. 294; Anderson *v.* Hodgson, 5 Price, R. 630; King *v.* Meredith, 2 Camp. R. 639; Swain *v.* Shepherd, 1 M. & Rob. R. 223; Bradford *v.* Marbury, 12 Ala. R. 520.

<sup>3</sup> Davis *v.* James, 5 Burr. R. 2680.

<sup>4</sup> Stephenson *v.* Hart, 1 Moore & Payne, R. 357; 4 Bing. R. 476; Duff *v.* Budd, 3 Brod. & B. R. 177; 6 Moore, R. 469.

<sup>5</sup> Swain *v.* Shepherd, 1 Mood. & Rob. R. 223.

<sup>6</sup> 2 Kent, Comm. Lect. 39, p. 500; Cothay *v.* Tute, 3 Camp. R. 129.

agreement is upon the vendee.<sup>1</sup> As soon as the goods are in the due and regular course of conveyance, they are at the risk of the vendee, and not before.<sup>2</sup>

§ 807. *Secondly*, As to the place where goods must be delivered. In regard to delivery of portable goods, the common law makes a distinction between a contract of sale, and a contract to pay an existing debt in specific articles. In a contract of sale, if no place of delivery be agreed upon, the goods must be delivered at the place where they are at the time of the sale, unless some other place be designated by usage.<sup>3</sup> But if a particular place be appointed by the contract, the goods sold must be proved to have been delivered at such place, in order to sustain an action for the price.<sup>4</sup> But where goods are to be delivered in payment of a previous debt, and no place is specially appointed, or is to be inferred from the usage of trade, or the nature of the thing, it is the duty of the debtor, first, to request the creditor to appoint a place,<sup>5</sup> whereupon the creditor must appoint a place which is reasonable; if he do not, the debtor himself may name a reasonable place, giving notice to his creditor; and a tender of the property at that place will be good.<sup>6</sup> So, also, where the time of

<sup>1</sup> Cothay *v.* Tute, 3 Camp. R. 129; London Law Mag. vol. 4, p. 359; Story on Agency, § 190; Smith *v.* Lascelles, 2 T. R. 189.

<sup>2</sup> Ullock *v.* Riddelein, Dan. & Lloyd's Merc. Cas. 6.

<sup>3</sup> 2 Kent, Comm. Lect. 39, p. 505; Lobdell *v.* Hopkins, 5 Cowen, R. 516; Goodwin *v.* Holbrook, 4 Wend. R. 380; Barr *v.* Myers, 3 Watts & Serg. R. 295.

<sup>4</sup> Savage Manuf. Co. *v.* Armstrong, 19 Maine R. 147; Howard *v.* Miner, 20 Maine R. 325. See Armitage *v.* Insole, 14 Q. B. R. 728; West *v.* Newton, 1 Duer, R. 277.

<sup>5</sup> Bean *v.* Simpson, 16 Maine R. 49.

<sup>6</sup> 2 Kent, Comm. Lect. 39, p. 507; Co. Lit. 210 b; Aldrich *v.* Albee, 1 Greenl. R. 120; Bixby *v.* Whitney, 5 Ibid. 192; Mingus *v.* Pritchett, 3 Dev. N. C. R. 78; Currier *v.* Currier, 2 N. Hamp. R. 75; Minor *v.* Michie, 1 Walk. Miss. R. 24; Chipman on Cont. 29, 30; Scott *v.* Crane, 1 Conn. R. 255; Higgins *v.* Emmons, 5 Conn. R. 76; Mason *v.* Briggs, 16 Mass. R. 453; Slinger-

delivery is fixed, although the place is not, the same rule applies.<sup>1</sup>

§ 808. If a debtor actually make a tender of specific articles, at the time and place appointed, either in person or by his agent, and if the creditor either refuse to accept them, or be not present, the debtor may mark the goods, and set them apart; and this is a sufficient delivery to discharge the debt, and to pass the right of property to the creditor.<sup>2</sup> If, however, the debtor retain possession of the goods, he holds them as bailee of the creditor.<sup>3</sup>

§ 809. *Thirdly.* As to the time of delivery.<sup>4</sup> Ordinarily, a vendee is bound to receive and pay for goods which are offered to him within a reasonable time. If credit be given to the buyer, the seller is nevertheless bound to make a delivery immediately, or within reasonable time after request, and cannot postpone it until the time of credit has elapsed, unless with the express or implied consent of the buyer.<sup>5</sup> If no credit be given, the vendor is not bound to deliver until payment or tender of payment is made; and if he offer to deliver, and

land *v. Morse*, 8 Johns. R. 474; *Barr v. Myers*, 3 Watts & Serg. R. 295. In Vermont and New York, however, portable goods must be delivered at the domicil of the creditor; but if the goods be ponderous and bulky, the rule of the text obtains. 2 Kent, Comm. Lect. 39, p. 507; *Goodwin v. Holbrook*, 4 Wend. R. 377; *Chipman on Cont.* 29, 30; *Pothier, Traité des Oblig.* n. 512; *Contrat de Vente*, No. 45, 46, 51, 52, B.

<sup>1</sup> *Barr v. Myers*, 3 Watts & Serg. R. 295.

<sup>2</sup> 2 Kent, Comm. Lect. 39, p. 508; *Co. Lit. 207 a*, and *Peytoe's case*, 9 Co. R. 79 a; *Lamb v. Lathrop*, 13 Wend. R. 95; *Savary v. Goe*, 3 Wash. C. C. R. 140; *Smith v. Loomis*, 7 Conn. R. 110; *Garrard v. Zachariah*, 1 Stew. Ala. R. 272; *Thaxton v. Edwards*, Ibid. 524; *Johnson v. Baird*, 3 Blackf. Ind. R. 182; *Leballister v. Nash*, 24 Maine R. 316.

<sup>3</sup> 2 Kent, Comm. Lect. 39, p. 508; *Mason v. Briggs*, 16 Mass. R. 453; *Bailey v. Simonds*, 6 N. Hamp. R. 159, and cases cited immediately above.

<sup>4</sup> See post, § 970, § 971, § 972.

<sup>5</sup> *Bloxam v. Sanders*, 4 Barn. & Cres. R. 941; *Startup v. Cortazzi*, 2 Cromp. Mees. & Rose. R. 169; *Startup v. Macdonald*, 7 Scott, (n. s.) R. 285, 297

payment or tender be not made within reasonable time afterwards, he may sue therefor, or he may treat the contract as being dissolved.<sup>1</sup> But if credit be given, he cannot rescind the contract, of his own motion, merely because of the default of the vendee in not complying with the exact terms of the contract.<sup>2</sup> If he sell the goods, which he may do after notice, under certain circumstances, he can only recover the difference between the price they bring, and the price before due.<sup>3</sup> If a special time for delivery be appointed in the original contract, neither party can insist upon delivery before such time. And if the vendee, before such time occur, give notice that he will not receive the goods, the vendor is nevertheless bound to wait until the appointed time, and see whether the vendee will not *then* pay for them.<sup>4</sup> When a particular day is appointed for the delivery of goods, or for the payment of the price, “the party has the whole of the day, and if one of several days, the whole of those days, for the performance of his part of the contract; and, until the whole day, or the whole of the last day, has expired, no action will lie against him for the breach of such contract. In such a case, the party bound must find the other, at his peril, and within the time limited, if the other be within the four seas, and he must do all that without the concurrence of the other he can do to make the payment or perform the act; and that a convenient time before midnight, varying according to the quantum of the payment, or nature of the act to be done. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party receiving to receive and count, or, if to deliver goods, he must

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<sup>1</sup> *Langfort v. Tiler*, 1 Salk. R. 113; *Lanyon v. Toogood*, 13 Mees. & Welsb. R. 27.

<sup>2</sup> *Wilmhurst v. Bowker*, 3 Scott, N. R. 272; *Milgate v. Kebble*, 3 Scott, N. R. 358; *Martindale v. Smith*, 1 Adolph. & Ell. (N. s.) R. 395.

<sup>3</sup> See post, § 547; *Maclean v. Dunn*, 4 Bing. R. 722.

<sup>4</sup> *Phillpotts v. Evans*, 5 Mees. & Welsb. R. 477. But see *Cort v. Ambergate, Nottingham, &c. Railway*, 6 Eng. Law & Eq. R. 236; *Ripley v. McClure*, 4 Exchq. R. 345.

tender them a sufficient time for their examination and receipt. This done, he has, *so far as he could*, paid or delivered within the time, and it is by the fault of the other only that the payment or delivery is not complete. But, where the thing to be done is to be performed *at a certain place*, on, or on or before, a certain day, to another party to a contract, there the tender must be to the other party *at that place*, and, as the attendance of the other is necessary at that place to complete the act, there the law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day, where the thing is to be done on one day, or for the whole series of days, where it is to be done on or before a day certain, and therefore fixes a particular part of the day for his presence, and it is enough if he is at the place at such a convenient time before sunset on the last day as that the act may be completed by daylight; and, if the party bound tender to the party there, if present, or, if absent, be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient.”<sup>1</sup>

§ 810. We now come to *constructive delivery*. When the goods are so ponderous and bulky that they cannot be manually delivered, or when they are not in the personal custody of the seller, the law does not require an actual delivery, but only that they be placed in the power of the purchaser; or that his authority as owner be acknowledged by some formal act or declaration of the seller; or be asserted by some formal act of the buyer, with the assent of the seller. The transference of any article, which is an indication or evidence of ownership, or any act by either party assented to by the other, which implies a change of ownership, is a sufficient constructive delivery;<sup>2</sup> for the law never insists upon an actual delivery, when it would be impracticable. Thus, the delivery of the key of a

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<sup>1</sup> Per Parke, B., *Startup v. Macdonald*, 7 Scott, (N. S.) R. 285, 297.

<sup>2</sup> *Manton v. Moore*, 7 T. R. 67; •*Chaplin v. Rogers*, 1 East, R. 194.

warehouse in which the goods sold are deposited;<sup>1</sup> or the transferring them on the books of the wharfinger, or warehouse-keeper, to the name of the buyer, with mutual consent; or the delivery of the receipt, ticket, sale-note, dock-warrant, certificate, or other usual evidence of title to goods in the situation of goods sold, is a sufficient delivery of them.<sup>2</sup> So, also, upon the same principle, the title to a ship at sea may be passed by the delivery of the grand bill of sale, which is the documentary evidence of title.<sup>3</sup> And goods at sea may also be conveyed to the buyer by the delivery of the bill of lading or assignment, if so intended.<sup>4</sup> So, also, the marking of a bale of goods in a warehouse with the vendee's name, with consent, is a sufficient delivery to vest the title,<sup>5</sup> but not to constitute an acceptance within the statute, unless the terms of payment be settled, and the contract be otherwise complete.<sup>6</sup> So, if the vendor take the vendee within sight of ponderous articles, such as logs lying within a boom, and show them to him, it is a sufficient delivery, although the vendee, in compliance with the usage, allow them to remain there; because this is the only practicable mode of making an immediate delivery of such articles, in such a situation;<sup>7</sup> and the law only

<sup>1</sup> Chappel *v.* Marvin, 2 Aiken, R. 79; Wilkes *v.* Ferris, 5 Johns. R. 335.

<sup>2</sup> Chaplin *v.* Rogers, 1 East, R. 194; Hurry *v.* Mangles, 1 Camp. R. 452; 2 Stark. Ev. 591, and cases cited; Hollingsworth *v.* Napier, 3 Cow. R. 182; Wilkes *v.* Ferris, 5 Johns. R. 335; Ryall *v.* Rolle, 1 Atk. R. 171; Harman *v.* Anderson, 2 Camp. R. 243; 2 Kent, Comm. Lect. 39, p. 500; Searle *v.* Keeves, 2 Esp. R. 598; Lucas *v.* Dorrien, 7 Taunt. R. 288; Jewett *v.* Warren, 12 Mass. R. 300; Rice *v.* Austin, 17 Mass. R. 204; Spear *v.* Travers, 4 Camp. R. 251; Zwinger *v.* Samuda, 7 Taunt. R. 265; Nichols *v.* Patten, 18 Maine R. 231.

<sup>3</sup> Atkinson *v.* Maling, 2 T. R. 465; Winsor *v.* McLellan, 2 Story, R. 492.

<sup>4</sup> Kent, Comm. Lect. 39, p. 500; Long on Sales, Rand's ed. 69; Pratt *v.* Parkman, 2<sup>1</sup> Pick. R. 42; Chandler *v.* Sprague, 5 Metcalf, R. 306; Ezell *v.* English, 6 Porter, R. 311; Bonner *v.* Marsh, 10 Smedes & Marsh. R. 376.

<sup>5</sup> Stoveld *v.* Hughes, 14 East, R. 312; Barney *v.* Brown, 2 Verm. R. 374; 1 Bell, Comm. 176.

<sup>6</sup> Proctor *v.* Jones, 2 Car. & P. R. 532; ante, § 790 et seq.

<sup>7</sup> Jewett *v.* Warren, 12 Mass. R. 300; 2 Kent, Comm. Lect. 39, p. 501;

requires such a delivery of the articles sold as is consistent with the nature of the thing. So, also, on the same principle, where goods are stored, and are inaccessible to the parties — as if they be in the custody of the officers of the government — the delivery of a sample is a sufficient delivery of the whole, if it be accepted as a part of the quantity purchased; or as a sign of a general transference of all the goods admitted to be sold by the parties.<sup>1</sup> The ground upon which such acts are considered as amounting to a constructive delivery is, that they manifest an intention on the part of the seller to part then with his property, and an intention on the part of the buyer to assume a title thereto. These acts are, however, but *prima facie* evidence of a delivery, and may be otherwise explained by evidence of the manifest intention of either party not to make such a delivery as would otherwise be presumed.

§ 810 a. So, also, if the property sold be in the hands of a third person, and, at the request of the vendor, he consent to hold them as bailee of the vendee, there is a constructive delivery so as to pass the property, and the creditors of the vendor cannot attach it.<sup>2</sup> And even although such bailee do not consent to hold them for the vendee, yet, if a request be made to him, and a bill of parcels be delivered to the vendee, the property would be thereby changed.<sup>3</sup> But if no notice of the sale be given to the bailee, the mere delivery of the bill of parcels would not be sufficient as against a subsequent attachment by a creditor of the vendor.<sup>4</sup> So, also, the mere sending of a delivery order on a warehouse-man to the purchaser, without

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Boynton *v.* Veazie, 24 Maine R. 286; Shindler *v.* Houston, 1 Denio, R. 48.

<sup>1</sup> Hinde *v.* Whitehouse, 7 East, R. 558; Magee *v.* Billingsley, 3 Alab. R. 679.

<sup>2</sup> Potter *v.* Washburn, 13 Verm. R. 558; Carter *v.* Willard, 19 Pick. R. 1; Linton *v.* Butz, 7 Barr, R. 89.

<sup>3</sup> Carter *v.* Willard, 19 Pick. R. 1. See ante, § 376 *u.*, et seq.

<sup>4</sup> *Ibid.*

solicitation on his part, will not alone transfer the property to the vendee, where it appears that it is not in a deliverable state.<sup>1</sup>

§ 811. The delivery of a sample, as a sample, will not, however, constitute a sufficient delivery of all the goods. The question, whether a delivery of a part is a delivery of the whole, when there is no agreement so to consider it, depends solely upon the question, whether the contract is an entirety or not. If the contract be an entire contract, and incapable of severance, the delivery of a part, necessarily, is a delivery of the whole.<sup>2</sup> But if it be a severable contract, the delivery of a part is only a delivery *pro tanto*. The same rule applies to the acceptance of the buyer, under the statute of frauds, as to those goods, in regard to which the seller has performed all his duty.<sup>3</sup>

§ 812. If the buyer unreasonably refuse to accept goods, the title to which has been passed to him in the mode already stated, the vendor is under no obligation to allow them to perish in his hands, or to become reduced in value. The proper course for him to pursue is, upon the neglect or refusal of the vendee to come and take them within reasonable time, after giving due notice, to sell them at auction, and hold the buyer responsible for the difference between the price which he agreed to give, and the actual price which they bring.<sup>4</sup>

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<sup>1</sup> Batre *v.* Simpson, 4 Alab. R. 305; Burrall *v.* Jacot, 1 Barb. (S. C.) R. 165.

<sup>2</sup> See Brewer *v.* Salisbury, 9 Barb. R. 511; Chamberlain *v.* Farr, 23 Verm. R. 265.

<sup>3</sup> Slubey *v.* Heyward, 2 H. Bl. R. 504; Rhode *v.* Thwaits, 6 Barn. & Cres. R. 393; Hanson *v.* Meyer, 6 East, R. 614.

<sup>4</sup> 2 Kent, Comm. Lect. 39, p. 505; Sands *v.* Taylor, 5 Johns. R. 395; Adams *v.* Minick, cited 5 Serg. & Rawle, R. 32; Girard *v.* Taggart, 5 Serg. & Rawle, R. 19; Maclean *v.* Dunn, 1 Moore & Payne, R. 761; 4 Bing. R. 722; Stewart *v.* Cauty, 8 Mees. & Welsb. R. 160.

§ 813. Where goods are ordered to be manufactured, the right of property does not become vested in the vendee, ordinarily, nor has the vendor a right to claim the price, until the article is completely finished and ready for delivery, and has been *approved* of by the vendee. After it is finished and ready for him, and offered to him, and he has approved it, it becomes his property, and is ever afterwards at his risk, provided nothing remain to be done to it by the vendor.<sup>1</sup> But although a specific article be intended by the manufacturer for the orderer, and have been made in compliance with his order, the orderer has no right thereto, until the maker has appropriated it or offered it specially to him; for although it have been made in consequence of the order, yet, if the maker choose, he may ordinarily appropriate it to any other person, and proceed to make a new article to answer the order.<sup>2</sup> Nor does it make any difference as to this rule whether or not the price have been advanced. But after the article has been appropriated to the orderer, or offered to him and approved, the manufacturer has no power to transfer the property to another person. So, also, if it have been specially appropriated to the orderer, the manufacturer cannot dispose of it, although it remain in his hands for the purpose of having some new and additional work done on it.<sup>3</sup> Where the contract provides that the work shall be done under the supervision of a certain person appointed by the purchaser, and such person accordingly supervises the work, his superintendence and approval operate to appropriate the specific work, so that the manufacturer cannot dispose of it to another person without the consent<sup>\*</sup> of the orderer.<sup>4</sup> Where the payment is agreed to be

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<sup>1</sup> Atkinson *v.* Bell, 8 Barn. & Cres. R. 282; Mucklow *v.* Mangles, 1 Taunt. R. 318; Clark *v.* Spence, 4 Adolph. & Ell. R. 466; Laidler *v.* Burlinson, 2 Mees. & Welsb. R. 615; Elliott *v.* Pybus, 10 Bing. R. 512.

<sup>2</sup> Ibid.

<sup>3</sup> Carruthers *v.* Payne, 2 Moore & Payne, R. 441.

<sup>4</sup> Clarke *v.* Spence, 4 Adolph. & Ell. R. 470; Woods *v.* Russell, 5 Barn. & Ald. R. 942. See, also, India Rubber Co. *v.* Hoyt, 1 Metcalf, R. 139.

made by certain instalments at fixed times, or at distinct stages of the work, the work finished at the payment of each instalment becomes the property of the orderer, and is at his risk, while any additional work done on it before the time of the payment of the next instalment, although it be appropriated to the work, is at the risk of the manufacturer.<sup>1</sup> It follows that the manufacturer has at any time a lien on the property for the work done additional to that which is paid for by last instalment.<sup>2</sup> If the article be destroyed while in the process of manufacturing or building, the orderer loses his advances, and the maker or manufacturer all the work not already paid for. Where materials are supplied by the orderer, the manufacturer cannot appropriate the goods to any one else; and in case of loss, before finishing, the orderer loses his materials, and the value of the work done, which he is obliged to pay to the manufacturer.<sup>3</sup>

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<sup>1</sup> Woods *v.* Russell, 5 Barn. & Ald. R. 942; Clarke *v.* Spence, 4 Adolph. & Ell. R. 470; Atkinson *v.* Bell, 8 Barn. & Cres. R. 282.

<sup>2</sup> Ibid.

<sup>3</sup> Ante, § 739; Gillett *v.* Mawman, 1 Taunt. R. 137; Menetone *v.* Athawes, 3 Burr. R. 1592.

## CHAPTER XIX.

## STOPPAGE IN TRANSITU.

§ 814. AFTER the contract of sale is completed, the vendor still retains the right to reassume the possession of goods, while on their way to the vendee, if they be unpaid for, and if the vendee become insolvent during their carriage. This right is called the right of stoppage *in transitu*, which, although unknown to the ancient common law, has been engrafted upon it by courts of equity, and become part of the law merchant.<sup>1</sup> Inasmuch, however, as it is founded in equity, it cannot be so exercised as to interfere with the just rights of third persons, acquired *bona fide*. Thus, if a vendee pay for goods by a bill of exchange, and resell them to a third person before the bill is dishonored, and before the vendee's insolvency, the right of stoppage *in transitu* is determined.<sup>2</sup> The right of stoppage *in transitu* supersedes the lien of the carrier for a general balance between him and the consignee; but the lien of the carrier or

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<sup>1</sup> Ellis *v.* Hunt, 3 T. R. 465; Newsom *v.* Thorton, 6 East, R. 17; Hodgson *v.* Loy, 7 T. R. 440; London Law Mag. vol. 5, p. 155. Lord Mansfield, however, in Assignees of Burghall *v.* Howard, 1 H. Bl. R. 565, n., declares that the rule is founded, "not upon principles of equity only, but the laws of property." See, also, Lord Loughborough's opinion in Mason *v.* Lickbarrow, 1 H. Bl. R. 362, et seq.

<sup>2</sup> Hawes *v.* Watson, 2 Barn. & Cres. R. 543; Dixon *v.* Yates, 5 Barn. & Adolph. R. 336; Miles *v.* Gorton, 4 Tyrw. R. 299.

wharfinger, in respect to the particular subject, supersedes that of the seller.<sup>1</sup>

§ 815. The stoppage of goods *in transitu* does not operate to rescind the contract of sale, but only to revest in the vendor that possession, which is the sole foundation for his equitable lien on the goods for the purchase-money.<sup>2</sup> The vendee, therefore, at any time after stoppage, may recover the goods, upon payment or tender of the price; and the vendor may maintain an action for goods bargained and sold, notwithstanding the stoppage *in transitu*, if he be ready to deliver them up to the vendee upon payment.<sup>3</sup>

§ 816. The right of stoppage *in transitu* is a right, however, confined to a vendor or consignor; and it must be exercised by him either personally, or by some person acting for him adversely against the buyer. A ratification, by the vendor, of an act of stoppage *in transitu* made after the delivery, will not be sufficient.<sup>4</sup> But there are cases in which this right is recognized, although the contract under which the goods were consigned may not be literally a contract of sale,—as where a factor or agent purchases goods for his principal, and consigns them to him on credit, with an additional charge of commission, and no privity exists between such principal and the vendor, the agent or factor may stop the goods *in transitu*.<sup>5</sup> A

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<sup>1</sup> Oppenheim *v.* Russell, 3 Bos. & Pul. R. 42; Morley *v.* Hay, 3 Man. & Ryl. R. 396; 2 Kent, Comm. Lect. 39, p. 541.

<sup>2</sup> See Rogers *v.* Thomas, 20 Conn. R. 53; Martindale *v.* Smith, 1 Q. B. R. 389; Chandler *v.* Fulton, 10 Texas R. 2.

<sup>3</sup> Kymer *v.* Suwerkropp, 1 Camp. R. 109; Hodgson *v.* Loy, 7 T. R. 440; Rowley *v.* Bigelow, 12 Pick. R. 313; Long on Sales, Rand's ed. 337, and cases cited; 2 Kent, Comm. 541; Edwards *v.* Brewer, 2 Mees. & Welsb. R. 378; Miles *v.* Gorton, 2 Cromp. & Mees. R. 512; Boorman *v.* Nash, 9 Barn. & Cres. R. 145; Clay *v.* Harrison, 10 Barn. & Cres. R. 99.

<sup>4</sup> Bird *v.* Brown, 4 Excheq. R. 786.

<sup>5</sup> Feise *v.* Wray, 3 East, R. 93.

mere surety for the price of the goods cannot, however, stop them; and even a countermand made by the buyer in behalf of the seller, will not enure to the benefit of the seller, if it interfere with the rights of third persons.<sup>1</sup> But if such a countermand be assented to by the seller, and the rights of no third persons intervene, the contract of sale is thereby rescinded.<sup>2</sup> No person, having a mere lien upon goods, without any property in them, possesses the right of stoppage *in transitu*. For a mere lien is determined by such a voluntary parting with the actual possession, as is incidental to this right.<sup>3</sup>

§ 817. There are two necessary prerequisites to the right of stoppage *in transitu*; and these are, 1st. That the vendee be insolvent; 2d. That the goods be unpaid for. The insolvency of the vendee does not, of itself, remit to the vendor the right of possession, nor rescind the contract, but only invests the vendor with the privilege of stopping the goods as a security for the price, if he chooses to exercise it. Any well founded information of such an embarrassment on the part of the vendee as to disable him from honoring his drafts, or meeting the demands of his creditors, is a sufficient insolvency to justify the vendor in stopping the goods.<sup>4</sup> But, inasmuch as it is a privilege allowed to the seller, for the express purpose of protecting him against the insolvency of the buyer, he cannot exercise it, unless the buyer be insolvent. And if, from excess of caution, or misinformation, he stop the goods when the buyer

<sup>1</sup> Feise *v.* Wray, 3 East, R. 93; 2 Selw. Nisi Prius, 1270, (11th ed.), Stoppage in transitu; Siffken *v.* Wray, 6 East, R. 371; Richardson *v.* Goss, 3 Bos. & Pul. R. 119. See Ash *v.* Putnam, 1 Hill, R. 302; Naylor *v.* Dennis, 8 Pick. R. 198.

<sup>2</sup> Bartram *v.* Farebrother, Dan. & Lloyd, Merc. Cas. 42; s. c. 1 Moore & Payne, R. 515; 4 Bing. R. 579.

<sup>3</sup> Sweet *v.* Pym, 1 East, R. 4; Siffkin *v.* Wray, 6 East, R. 371; London Law Mag. vol. v. 159; Abbott on Shipp. 373.

<sup>4</sup> See, on this subject, Hays *v.* Mouille, 14 Penn. St. R. 51; Chandler *v.* Fulton, 10 Texas R. 2; Rogers *v.* Thomas, 20 Conn. R. 54.

is not actually insolvent, the buyer is entitled to the goods, and to an indemnification for the expenses incurred in consequence of the stoppage.<sup>1</sup>

§ 818. With regard to payment, the rule is, that the vendor is only deprived of the right of stoppage, upon the payment of the whole price. A partial payment only reduces the lien of the vendor *pro tanto*, but does not deprive him of the right of repossessing himself of all the goods, and retaining them until the whole price is paid.<sup>2</sup> Neither would the receipt of a bill of exchange for the goods be such a payment as to defeat the right.<sup>3</sup> Where the goods, however, are consigned in payment of an existing debt, the consignor has no right of stoppage; because, as no price is due, he would have no lien on the goods.<sup>4</sup> But, wherever there are reciprocal liabilities on an unsettled account between vendor and vendee, the vendor has a right of stoppage, and is not obliged to wait for a final adjustment and balance of accounts.<sup>5</sup>

§ 819. The right of the vendor to stop the goods may, however, be determined either by, 1st. An actual delivery into the possession of the vendee; or, 2dly, By a constructive delivery. Whenever the transitus is terminated, the right of stoppage is gone; and if an actual delivery have taken place, the mere fact that it was made by an agent or servant, after notice not to deliver had been received by his principal or master, will not operate to stop the goods.

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<sup>1</sup> *The Constantia*, 6 Rob. Adm. 321; *Abbott on Shipp.* 371.

<sup>2</sup> *Feise v. Wray*, 3 East, R. 102; *Hodgson v. Loy*, 7 T. R. 440; *Newhall v. Vargas*, 13 Maine R. 93; 2 Kent, Comm. Lect. 39, p. 541.

<sup>3</sup> See *Hays v. Mouille*, 14 Penn. St. R. 48; *Donath v. Broomhead*, 7 Barr, R. 301; *Edwards v. Brewer*, 2 Mees. & Welsb. R. 375.

<sup>4</sup> *Vertue v. Jewell*, 4 Camp. R. 31; *Smith v. Bowles*, 2 Esp. R. 578; 7 D. & R. R. 128, 129; *Clark v. Mauron*, 3 Paige, R. 373.

<sup>5</sup> *Wood v. Jones*, 7 Dowl. & Ryl. R. 126; *Kinloch v. Craig*, 3 T. R. 119.

§ 820. 1st. *By Actual Delivery.* If the goods come into the actual possession of the vendee, and within his corporal touch, the right of the vendor to stop them is gone;<sup>1</sup> whether such possession be obtained by the arrival of the goods at the place designated by the vendee; or by a delivery at his warehouse; or at a warehouse used by him, but belonging to another person;<sup>2</sup> or be intercepted by him on their passage.

§ 821. 2d. *Constructive Delivery.* A constructive delivery of the goods will ordinarily defeat the vendor's right to stop them. There are, however, exceptions to this rule; and the distinction which seems to reconcile all the contradictory cases of constructive delivery is, that if the delivery be to an agent or carrier of the vendee, for the purpose of transmission or carriage to the vendee, it will not interfere with the right of the vendor;<sup>3</sup> but if the delivery be to a special agent or bailee, representing the vendee, and receiving the goods either for custody only, or for sale, or other disposal, as the vendee shall subsequently direct, the right of stoppage is gone.<sup>4</sup> Whenever, therefore, goods are sent to an agent, to be forwarded by him to the vendee, they are not constructively delivered until they come to the

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<sup>1</sup> 2 Kent, Comm. Lect. 39, p. 547; Oppenheim *v.* Russell, 3 B. & P. R. 44; Mills *v.* Ball, 2 B. & P. B. 461; Foster *v.* Frampton, 6 B. & C. R. 109; Newhall *v.* Vargas, 13 Maine R. 93.

<sup>2</sup> Hunter *v.* Beal, cited 3 T. R. 466; James *v.* Griffin, 2 Mees. & Welsb. R. 632; Scott *v.* Pettit, 3 Bos. & Pul. R. 469; Rowe *v.* Pickford, 8 Taunt. R. 88; Dixon *v.* Baldwin, 5 East, R. 175; Barrett *v.* Goddard, 3 Mason, R. 107.

<sup>3</sup> Newhall *v.* Vargas, 13 Maine R. 93.

<sup>4</sup> 2 Kent, Comm. Lect. 39, p. 545; Selw. N. P. R. 427 (11th ed.); Leeds *v.* Wright, 3 Bos. & Pul. R. 320; Rowe *v.* Pickford, 8 Taunt. R. 88; Wright *v.* Lawes, 4 Esp. R. 82; Fowler *v.* Kymer, cited in 3 East, R. 396; Stubbs *v.* Lund, 7 Mass. R. 457; Dixon *v.* Baldwin, 5 East, R. 175; Foster *v.* Frampton, 6 B. & Cress. R. 109; Hodgson *v.* Loy, 7 T. R. 440; Mills *v.* Balls, 2 Bos. & Pul. R. 457; Loeschman *v.* Williams, 4 Camp. R. 181; Sawyer *v.* Joslin, 20 Verm. (5 Washburn,) R. 172; Key *v.* Cotesworth, 14 Eng. Law & Eq. R. 435.

vendee's possession.<sup>1</sup> Whether a delivery to a common carrier, or packer, or warehouse-man, be a constructive delivery, so as to defeat the right of the vendor, or not, depends upon the question, whether he held them as a mere intermediate person, or as a special agent or bailee. But although a vendee, to whom goods have been shipped, have paid the freight or given his note, yet if, in consequence of the loss of the invoice, the goods be stored in the custom-house on their arrival, and do not come to his possession, and there remain until the note becomes due, and is not paid, and the maker becomes insolvent, the vendor's right of stoppage still remains.<sup>2</sup>

§ 822. Another test of constructive delivery is to be found in the question, whether the place of ultimate destination contemplated in the sale, has been reached. If it be reached, the right of stoppage is gone; if it be not, the right still remains. If, therefore, goods be sent to an agent, there to await further orders; or to be disposed of by him as he may think expedient; or to be sold by him; or to be transmitted to a different market, away from the vendee; the delivery would defeat the right of the vendor; for the obvious reason, that such a reception of the goods is the only reception thereof contemplated by the buyer.<sup>3</sup> So, if the goods be placed on board of

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<sup>1</sup> See *Aguirre v. Parmelee*, 22 Conn. R. 473.

<sup>2</sup> *Donath v. Broomhead*, 7 Barr, R. 301. See *Mottram v. Heyer*, 1 Denio, R. 483, 5 Ib. 629.

<sup>3</sup> 2 Kent, Comm. Lect. 39, p. 545; *Wright v. Lawes*, 4 Esp. R. 82; *Stokes v. La Riviere*, 3 East, R. 397. Here, goods were ordered by Messrs. Duhems of Lisle, and were first sent to their agents in London to be *forwarded* to their correspondents at Ostend, and by them to be *forwarded* to Messrs. Duhems. Of course, every agent was an intermediate carrier, or forwarder, and the goods were not delivered until they arrived at Lisle, into the hands of the buyer. See, also, *Coates v. Railton*, 6 Barn. & Cres. R. 422, where goods were purchased by a commission merchant in Manchester, to be *forwarded* to Lisbon, and it was held, that there was no determination of the *transitus* until they

a ship, the delivery will not be complete, if they are to be transported to the vendee; because an actual possession, subsequent to putting them on board, is provided for in the bills of lading.<sup>1</sup> But if they are to be transported to a foreign market, the delivery will be complete, because no other possession than that created by delivery on board of the ship is contemplated, or can be made under the circumstances.<sup>2</sup> So, also, where goods are deposited in a warehouse or in any place which can be considered as the warehouse, of the vendee, and he have immediate possession of them and control of them, the *transitus* is determined.<sup>3</sup> The place designated to the ven-

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arrived at Lisbon. But in *Rowe v. Pickford*, 8 *Taunt.* 83, where a London trader was in the habit of buying goods at Manchester, and allowing them to remain in the wagon office of the defendant, who was a carrier, until they were shipped to another port, away from the vendor, it was held, that the *transitus* was ended by the arrival of the goods at the office of the carrier; because no ulterior place was named to the vendor; and because the carrier became then the *special agent* of the vendee as warehouse-man. So in *Scott v. Petit*, 3 *Bos. & Pul. R.* 469, goods were ordered of a house in Manchester, and forwarded to the address of the buyer in London, at the Bull and Mouth. Thence, in consequence of general orders, the packer took them to his house, the buyer having no warehouse of his own. Here they were claimed by the vendor; and it was held, that the *transitus* was ended. In *Leeds v. Wright*, 3 *Bos. & Pul. R.* 320, Moisseron, the general agent in London of Legrand & Co. in Paris, purchased goods in their name in Manchester. Moisseron had a general authority to sends the goods where he should think it most beneficial. He sent them to a packer, and while in the packer's hands, Legrand & Co. failed and they were claimed by the vendor; and it was held, that the *transit* was ended and the delivery complete. See *Hunt v. Ward*, cited 3 *T. R.* 467; *Dixon v. Baldwin*, 5 *East.* R. 175; *Hunter v. Beal*, cited 3 *T. R.* 466; *Stubbs v. Lund*, 7 *Mass. R.* 457.

<sup>1</sup> *Newhall v. Vargas*, 13 *Maine R.* 93; *Covell v. Hitchcock*, 23 *Wend. R.* 611.

<sup>2</sup> *Stubbs v. Lund*, 7 *Mass. R.* 457; *Fowler v. Kymer*, cited in *Bothlink v. Inglis*, 3 *East.* R. 396. See *Van Casteel v. Booker*, 2 *Exch. R.* 708; *Turner v. Trustees of Liverpool Docks*, 6 *Eng. Law & Eq. R.* 507; *Wait v. Baker*, 2 *Exch. R.* 1; *Aguirre v. Parmelee*, 22 *Conn. R.* 473; *Jenkyns v. Brown*, 14 *Q. B. R.* 496; *Ellershaw v. Magniac*, 6 *Exch. R.* 570, note; *Cowasjee v. Thompson*, 5 *Moore, P. C.* 165.

<sup>3</sup> *Allan v. Gripper*, 2 *Cr. & Jerv. R.* 218; *Long on Sales*, Rand's ed. 331,

dor by the vendee, as the ulterior place, is the point where the *transitus* ceases, whether the goods be there received personally by the vendee, or by his agent.<sup>1</sup>

§ 822 a. So, also, where goods are landed on a wharf, at a distance from the vendee's place of business, yet if it be proved that the wharf is the place where the vendee usually received goods, and that after they were landed, neither the wharfinger nor any person acting for him or the carriers, had any charge of the goods, but that the vendee and other persons, whose goods were landed at the wharf, were accustomed to receive them there, and to transport them to their place of business for themselves; and if it also appear that there is no lien on the goods for freight or charges, they would be considered in the constructive possession of the vendee, and beyond the vendor's right of stoppage.<sup>2</sup>

§ 823. A constructive possession may, also, be acquired by a symbolical delivery; as by affixing a mark, taking samples, delivering the key of a warehouse, or a bill of parcels. But if any thing remain to be done by the consignor, the delivery will be incomplete, and, of course, the *transitus* will be undetermined.<sup>3</sup> So, also, where the seller has completed his duty, an actual delivery of a part is a constructive delivery of the whole, if the contract be entire; or if it be the intention to transfer the whole thus symbolically.<sup>4</sup> The presumption,

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and cases cited; Conard *v.* Atlantic Ins. Co. 1 Peters, R. 386; Foster *v.* Frampton, 6 B. & C. R. 107; Barrett *v.* Goddard, 3 Mason, R. 107; Mottram *v.* Heyer, 1 Denio, R. 483.

<sup>1</sup> Rowe *v.* Pickford, 8 Taunt. R. 83; Donath *v.* Broomhead, 7 Barr, R. 301; Frazer *v.* Hilliard, 2 Strob. R. 309. See Hays *v.* Mouille, 14 Penn. St. R. 48.

<sup>2</sup> Sawyer *v.* Joslin, 20 Verm. (5 Washburn), R. 172.

<sup>3</sup> Ellis *v.* Hunt, 3 T. R. 464; Wright *v.* Lawes, 4 Esp. N. P. C. R. 82; Foster *v.* Frampton, 6 Barn. & Cres. R. 107; Busk *v.* Davis, 2 Maule & Selw. R. 397; s. c. 5 Taunt. R. 622, *n.*; Harman *v.* Anderson, 2 Camp. R. 243.

<sup>4</sup> Slubey *v.* Hayward, 2 H. Black. R. 504; Hammond *v.* Anderson, 4

however, is, that the part delivery is intended as a delivery of the whole; but it may be rebutted.<sup>1</sup>

§ 824. A constructive delivery may be implied, so as to destroy the vendor's right of stoppage, by the exercise of any acts of ownership by the vendee adverse to the vendor's right. Thus, if the consignee, before the goods arrive at their place of ultimate destination, postpone the delivery,<sup>2</sup> or resell them, with the consent of the vendor,<sup>3</sup> the vendor loses his claim. So, also, if goods be delivered into a warehouse, owned by a third person, to whom the vendee pays rent, it is a delivery so as to defeat the right of the vendor.<sup>4</sup>

§ 825. The question whether a bill of lading, which contains the words "consignee, or his assigns," is of a negotiable nature, so as to pass the possession, without a delivery of the goods, has been much discussed, and particularly in the case of *Lickbarrow v. Mason*.<sup>5</sup> The law, as far as it is settled,

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Bos. & Pul. R. 69; *Miles v. Gorton*, 2 Cr. & Mees. R. 512; *Bunney v. Poyntz*, 4 Barn. & Adolph. R. 568.

<sup>1</sup> *Betts v. Gibbins*, 4 Nev. & Man. R. 76.

<sup>2</sup> *Foster v. Frampton*, 6 Barn. & Cres. R. 109.

<sup>3</sup> *Stoveld v. Hughes*, 14 East, R. 308, 312; *Hawes v. Watson*, 2 Barn. & Cres. R. 540, 543.

<sup>4</sup> *Wright v. Lawes*, 4 Esp. R. 82.

<sup>5</sup> This celebrated case came up first in the King's Bench, and the doctrine stated in the text was held. The defendant appealed to the Exchequer Chamber, and, in an elaborate opinion delivered by Lord Loughborough, the decision was reversed. The case was then carried to the House of Lords, where the judgment of the King's Bench was affirmed, and a most luminous opinion was delivered by Mr. Justice Buller; a new trial was, however, awarded, and a special verdict taken. The case was sent back again to the King's Bench, where the judges declared that their opinion was unchanged. See the report of this case in 2 T. R. 63; 1 H. Black. R. 357; 6 East, R. 17, note; 2 H. B. R. 211; 5 T. R. 367, 683. See, also, *Code de Commerce*, tit. *Revendication*; *Cuming v. Brown*, 1 Camp. R. 104; *Waring v. Cox*, 1 Camp. R. 369; *Coxe v. Harden*, 4 East, 211; *McEwan v. Smith*, 2 House of Lords Cases, 309. The same rule obtains in the United States. *Griffith v. Ingle-*

seems to be that a bill of lading is negotiable, but that its mere delivery does not determine the *transitus*. If it be assigned to an indorsee for value, without notice, the *transitus* is determined, and the right of stoppage is gone.<sup>1</sup> So, also, a *bonâ fide* assignee of a bill of lading may stop the goods while *in transitu*, upon the insolvency of his assignor, the first vendee, and sue the wharfinger, who refuses to deliver in his own name.<sup>2</sup> A bill of lading, signed by the master, however, is not conclusive evidence that the goods were actually shipped, as between a *bonâ fide* indorsee for value, and the ship-owner.<sup>3</sup>

§ 825 a. The effect of a stoppage *in transitu* is not to rescind the contract of sale, but to reinstate the parties in the same position as that in which they were before the vendor parted with the possession.<sup>4</sup> But if, during the passage, the vendee have incurred expenses thereon, as for freight and charges, he would have a claim therefor against the vendor, and a lien also on the goods.<sup>5</sup>

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dew, 6 Serg. & R. R. 429; Peters *v.* Ballistier, 3 Pick. R. 495; Walter *v.* Ross, 2 Wash. C. R. 283; Conard *v.* Atlantic Ins. Co. 1 Peters, U. S. R. 386.

<sup>1</sup> See the late case of Gurney *v.* Behrend, 25 Eng. Law & Eq. R. 128.

<sup>2</sup> Morison *v.* Gray, 9 Moore, C. R. 484.

<sup>3</sup> Berkley *v.* Watling, 7 Ad. & Ell. R. 29.

<sup>4</sup> Newhall *v.* Vargas, 15 Maine R. 321; Hodgson *v.* Loy, 7 T. R. 440; Tucker *v.* Humphreys, 4 Bing. R. 516.

<sup>5</sup> In Newhall *v.* Vargas, 3 Shepley, R. 321, Mr. Justice Shepley says: "The position, that it does not proceed upon the ground of rescinding the contract, also shows, that the principle upon which it does proceed, is that of restoring the party to his lien, by placing him in the same position as if he had never parted with the possession. In Hodgson *v.* Loy, Kenyon said, 'that it did not proceed, as the plaintiff's counsel supposed, on the ground of rescinding the contract.' In Tucker *v.* Humphreys, 4 Bing. R. 516, Parke, J., says: 'Not proceeding at all on the ground of the contract being rescinded by the insolvency or bankruptcy of the consignee of the goods, but as an equitable right adopted for the purpose of substantial justice.' In Bloxam *v.* Saunders, 4 B. & C. R. 941, Bayley, J., speaking of the consignee, says, 'he has not an indefeasible right to the possession, and his insolvency without payment of the

price defeats that right ;' that is, it defeats the right to the possession, not to the property. The contract is regarded as existing after the exercise of the right of stoppage, and the vendee or his assigns may recover the goods upon paying the amount due. The relations of vendor and vendee are in this respect the same as when the vendor has never parted with the possession ; and this tends to prove the principle to be as before stated. It is doubtless true, that parties may so conduct as to rescind the contract, where the right of stoppage is exercised, as well as where it is not. And in some of the cases in the books, it appears to have been the intention of the vendors to rescind. And there are expressions of the judges to be accounted for only from the belief, that such was the intention of the parties in the case then under consideration, or from a want of a clear perception of the principle which allowed the exercise of such a right. It would not be difficult to accumulate proofs that the principle upon which the doctrine rests is as before stated, but an apology is rather due for what has been offered.

" Proceeding to carry out these principles, the parties are to be placed in the same condition, as nearly as may be, in which they would have been, if the vendor had never parted with the possession of the goods. And if he would repossess himself of them, he must relieve them of all charges and burdens rightfully and necessarily accruing after he parted with the possession ; for the vendor cannot be allowed, by his attempt to regain possession, to put the vendee in a worse position than he would have been, had the possession remained with the vendor. And this requires him to pay the freight and intervening charges. This is in precise accordance with the rule in the Napoleon Code, b. 3, c. 11, t. 3, a. 579. And in note 197 to the translation, title 3, the learned translator says, ' thus the doctrine of revendication in mercantile cases, first borrowed in part by the English law from the French system of jurisprudence, has been modelled in France to the shape, and reduced to the extent, that it had received in England.' Thus clearly indicating, that such was understood to be the doctrine in England. And Mr. Justice Story, in note (f), 1 Wheat. R. 212, speaking of stoppage *in transitu*, says, the Napoleon Code 'adopts a principle similar to that of the common law,' and that it 'subjects the goods sold to the right of stoppage *in transitu* by the vendor upon the same conditions with our own law.' Upon these principles and authorities the representatives of the intestate are entitled to recover the freight and charges upon that portion of the cargo reclaimed.

" If the vendor is adjudged to pay freight, he claims to set off against it a debt due from the intestate to him on the purchase of a former cargo shipped by another vessel. It is not necessary to cite authorities to show, that the owners of a vessel have a lien on the cargo for freight. The well-known rule in mercantile law, that the ship is bound to the merchandise, and the merchandise to the ship is admitted here. This right is not destroyed, if the property be taken from the possession of the owners *in invitum*, or by operation of law. It is true, that this principle does not apply, where the

owner of the vessel is carrying his own goods; but when the vendor claims to repossess himself of the goods by virtue of his original title, it is not for him at the same time to declare the title to be in the vendee for the purpose of avoiding the vendee's lien for the freight; who may well claim to retain them until he is placed in a position as favorable as he would have been, if the goods had never been delivered. And as the whole rights of the consignor depend upon an extension of his lien after he has parted with the possession, it is not for him to deny to the consignee the equitable right to set up as against him the same lien, which he would have by law, if the goods were transported for another. When the right of stoppage is exercised, the goods become in fact transported not for the benefit of the vendee, but the vendor. In this mode the just rights of the parties may be secured to them, notwithstanding what has already taken place. And as it is the only way in which it can be done, the representatives of the consignee have a right to expect, that the court will exact of the consignor, who asserts what is sometimes denominated an equitable right, an adherence to the rule, that he who asks equity shall do equity."

## CHAPTER XX.

## EXPRESS AND IMPLIED WARRANTY.

§ 826. THE question which comes naturally next in order, after the contract of sale is completed, and the goods are reduced to the possession of the vendee, is, whether the goods are of the quality and nature which the vendee intended to buy. This leads us to the consideration of express and implied warranties. The general rule of law, applicable to all sales, is, that the buyer buys at his own risk; *caveat emptor*; unless the vendor give an express warranty; or unless the law imply a warranty, from the nature of the thing sold, and the circumstances of the sale; or unless the vendor have been guilty of a fraudulent representation, or concealment in regard to the things sold. These exceptions we shall consider consecutively.

## EXPRESS WARRANTY.

§ 827. Every affirmation made by the vendor, at the time of the sale, in relation to the goods, amounts to a waranty, provided it appear in evidence to be so intended.<sup>1</sup> But no man

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<sup>1</sup> *Pasley v. Freeman*, 3 T. R. 57; *Wood v. Smith*, 4 Car. & Payne, R. 46; *Morrill v. Wallace*, 9 N. Hamp. R. 111; *Chapman v. Murch*, 19 Johns. R. 290; *Swett v. Colgate*, 20 Johns. R. 196; *Henshaw v. Robins*, 9 Metcalf, R. 89; *Foster v. Estate of Caldwell*, 18 Verm. (3 Washburn,) R. 176; *Beals v. Olmstead*, 24 Verm. R. 114.

is bound beyond the actual terms of his warranty; and if he give a restricted or qualified warranty, his liability will not be the same as if it were absolute or general. Thus, if a person say, at the sale of a horse, "This horse is sound, so far as I know," and the horse prove unsound, the warrantor will not be bound, unless proof be given, that he knew of the unsoundness of the animal when he made the representation.<sup>1</sup> So, also, a bill of sale of a horse, on which he is stated as "considered sound," does not import a warranty of soundness.<sup>2</sup> The affirmation must also be made either at the time of the sale,<sup>3</sup> or prospectively, in reference to it;<sup>4</sup> and a warranty, made after sale, is without consideration, and therefore void.<sup>5</sup> A warranty of a future event, however, may be made.<sup>6</sup>

§ 828. It is not necessary that the words "warrant," or "warranty," should be used.<sup>7</sup> Whatever positive affirmation

<sup>1</sup> *Wood v. Smith*, 4 Car. & Payne, R. 46.

<sup>2</sup> *Wason v. Rowe*, 16 Verm. R. 525.

<sup>3</sup> See *Hopkins v. Tanqueray*, 26 Eng. Law & Eq. R. 254.

<sup>4</sup> *Wilmot v. Hurd*, 11 Wend. R. 584; *Hogins v. Plympton*, 11 Pick. R. 99; *Lysney v. Selby*, 2 Ld. Raym. R. 1120; 1 Roll. Abr. R. 96; 1 Str. R. 414; 1 Salk. R. 211.

<sup>5</sup> *Burdit v. Burdit*, 2 A. K. Marsh. R. 143; *Towell v. Gatewood*, 2 Scammon, R. 22.

<sup>6</sup> Lord Mansfield, in *Eden v. Parkison*, Doug. R. 735. But see *Liddard v. Cain*, 2 Bing. R. 183.

<sup>7</sup> *Roberts v. Morgan*, 2 Cow. R. 438. In the case of *Henshaw v. Robins*, 9 Metcalf, R. 88, Mr. Justice Wilde says: "To create an express warranty, the word 'warrant' need not be used, nor is any precise form of expression necessary; but every affirmation, at the time of the sale of personal chattels, amounts to a warranty. This seems to be now settled, notwithstanding the old case of *Chandlor v. Lopus*, Cro. Jac. 4, as to the sale of a bezoar stone, to the contrary. It was so decided in *Osgood v. Lewis*, and *Borrekins v. Bevan*, already cited, and in *Power v. Barham*, 4 Adolph. & Ellis, R. 473; in *Shepherd v. Kain*, 5 Barn. & Ald. R. 240; and in *Freeman v. Baker*, 2 Nev. & Man. R. 446. And even in New York, where, in other respects, the doctrine in *Chandlor v. Lopus* is adhered to, it has been held, nevertheless, that any representation of the thing sold, or direct affirmation of its quality and condition, showing an intention to warrant, is sufficient to amount to an express

is made by the seller respecting the thing sold, which operates, or may operate, as an inducement to the contract, is binding upon him.<sup>1</sup> Thus, if a vendor barely affirm that a chattel is his own, he warrants his title.<sup>2</sup> In fact, the mere sale of a

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warranty. It was so decided in *Chapman v. Murch*, 19 Johns. R. 290, and in *Swett v. Colgate*, 20 Johns. R. 196. To the rule of construction laid down in these cases, it was objected by Chief Justice Gibson, who delivered a dissenting opinion in *Borrekins v. Bevan*, that such a principle would extend to loose conversations between the vendor and vendee, in which the vendor may praise his goods, or express any opinion as to their qualities. But it is quite clear, I apprehend, that no such conversations or opinions would or could be construed as amounting to a warranty. No expression of an opinion, however strong, would import a warranty. But if the vendor, at the time of the sale, affirms a fact, as to the essential qualities of his goods, in clear and definite language, and the purchaser buys on the faith of such affirmation, that, we think, is an express warranty."

<sup>1</sup> In *Morrill v. Wallace*, 9 N. Hamp. R. 111, Mr. Justice Parker, after commenting on the cases, says: "We think that the matter does not depend upon the question whether it was a representation or not, or whether the vendor intended to be bound by a warranty or not, nor upon any particular form of words; but upon the question whether the vendor made any assertion or affirmation respecting the kind, quality, or condition of the article, or whether there was merely an expression of judgment, opinion, or belief. If the vendor made an assertion of that nature, upon which he intended the vendee should rely, and upon which he did rely, that is sufficient. *Duffee v. Mason*, 8 Cow. R. 25; 12 East, R. 637. An affirmation of an independent fact, made during a negotiation for a sale; as, for instance, a declaration that another person had offered a particular sum; is not to be regarded as a warranty. 2 Kent, Comm. 381; *Davis v. Meeker*, 5 Johns. R. 354.

"It is well settled that there is no particular form of words necessary to constitute a warranty. 19 Johns. R. 290; 2 Cowen, R. 438; 4 Ib. 440; 8 Ib. 25; 10 Wend. R. 413; 13 Ib. 278; 3 Vermont R. 53. 'I promise that the matter is so, is as well as if the words were, 'I will warrant that it is so.' 19 Johns. R. 290. And so if any other words of affirmation are used in such a manner as to show that the party expects or desires the other to rely upon the assertion, as a matter of fact, instead of taking it as an expression of the judgment or opinion of the vendor, it amounts to the same thing.

"There is 'nothing magical, nor necessarily any thing technical, about a warranty.'

<sup>2</sup> *Pasley v. Freeman*; 3 T. R. 58; *Medina v. Stoughton*, 1 Salk. R. 210; s. c. 1

thing, as we shall see, of itself constitutes a warranty that the title is in the vendor. But a mere expression of judgment or opinion, as to the nature and quality of the goods sold, if made in good faith,<sup>1</sup> or a simple commendation of goods, or vague assertions with regard to their value, do not amount to a warranty. *Simplex commendatio non obligat.*<sup>2</sup> Every man will trumpet forth the goodness of his wares, and it is the folly of the buyer, if he suffer himself to be imposed upon by boastful talk. And, therefore, any untrue affirmation of a matter, concerning which, by ordinary diligence, the buyer might have obtained correct information, will not be such a deception as to impose upon the seller the obligation of a warranty.<sup>3</sup>

§ 828 a. Where a bill of parcels, or sale note, is given, describing the goods sold, such description constitutes a warranty that the goods are precisely what they are described.<sup>4</sup> Thus, in an action on a sale note for "fifty-eight bales of

Lord Rym. R. 593; Jones *v.* Bright, 3 Moore & Payne, R. 155; 5 Bing. R. 533; Whitney *v.* Sutton, 10 Wend. R. 413; Gray *v.* Cox, 4 B. & C. R. 108; Wood *v.* Smith, 5 Man. & R. R. 124; Cave *v.* Coleman, 3 Man. & R. R. 2; Button *v.* Corder, 7 Taunt. R. 405; Adamson *v.* Jarvis, 12 Moore, R. 241.

<sup>1</sup> Morrill *v.* Wallace, 9 N. Hamp. R. 111; Ricks *v.* Dillahunty, 8 Porter, R. 133; Baum *v.* Stevens, 2 Iredell, R. 411; Foggart *v.* Blackweller, 4 Iredell, R. 238; Ante, § 511; Henshaw *v.* Robins, 9 Metcalf, R. 88.

<sup>2</sup> Chadelor *v.* Lopus, Cro. Jac. 4; Jendwine *v.* Slade, 2 Esp. R. 572; Power *v.* Barham, 4 Ad. & Ell. R. 473; 1 Mood. & R. R. 507; 7 Car. & Payne, R. 356; Wood *v.* Smith, 5 Man. & R. R. 124; Best *v.* Osborn, 2 Car. & Payne, R. 74; Budd *v.* Fairmaner, 8 Bing. R. 48; 1 Moore & Scott, R. 81; Freeman *v.* Baker, 2 Nev. & Man. R. 446; 1 Story, Eq. Jurisp. § 199, 200, 201; Ante, § 511.

<sup>3</sup> 1 Roll. Abr. 101, Pt. 6; 1 Sid. R. 146; Chadelor *v.* Lopus, Cro. Jac. 4; Dyer *v.* Hargrave, 10 Ves. R. 505; Sugden, Vend. & Purch. 543, (3d ed.) 19. As to the effect of misrepresentation and concealment, see ante, § 506 to § 522.

<sup>4</sup> Batturs *v.* Sellers & Patterson, 5 Harr. & Johns. R. 117; s. c. 6 Harr. & Johns. R. 249; Henshaw *v.* Robins, 9 Metcalf, R. 87; Bradford *v.* Manly, 13 Mass. R. 139; Power *v.* Barham, 4 Adolph. & Ell. R. 473; 2 Kent, Comm. 479. But see Seixas *v.* Wood, 2 Caines, R. 48; Tye *v.* Fynmore, 3 Camp. R. 462; Thrall *v.* Newell, 19 Verm. (4 Washb.) R. 202; Morrill *v.* Wallace, 9 N. Hamp. R. 115.

prime singed bacon," it was decided that the note amounted to a warranty that the article sold was prime singed bacon.<sup>1</sup> So, also, where the words of a bill of parcels were, "sold E. T. Hastings two thousand gallons prime quality winter oil," it was held, that it constituted a warranty, that the oil was of prime quality.<sup>2</sup> But where a bill of parcels is given, and it contains no description of the quality of the article sold, a warranty will not be implied, that they are of a particular quality or adapted to a specific use, in extension of the terms of the bill of parcels.<sup>3</sup>

§ 828 b. But if a bill of parcels contain an express warranty in respect to certain qualities, no other warranty will be implied, on the ground, that, "Expressio unius est exclusio alterius."<sup>4</sup> And, therefore, if there be additional words of description, it would seem, that they do not constitute a warranty. So, also, where the description must, from the nature of the case, be considered as a mere statement of opinion,—

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<sup>1</sup> Yates v. Pym, 6 Taunt. R. 446.

<sup>2</sup> Hastings v. Lovering, 2 Pick. R. 214.

<sup>3</sup> Lamb v. Crafts, 12 Metcalf, R. 353, 355.

<sup>4</sup> Budd v. Fairmaner, 8 Bing. R. 51. "In this case," said Tindal, C. J., "a written instrument was produced by the plaintiff to show the nature of the contract between him and the defendant; and we are to interpret that instrument, like all others, according to the intention of the parties. The instrument appears to be a receipt for £10, 'for a gray four year old colt, warranted sound.' I should say that upon the face of this instrument, the intention of the parties was to confine the warranty to soundness, and that the preceding statement was matter of description only." And again: "A party who makes a simple representation stands, therefore, in a very different situation from a party who gives a warranty. And if so, how can I say that this distinction was not present to the mind of the defendant in this case? When he sells a gray four year old colt, warranted sound, he means to say, that he will be responsible for the soundness, but that the rest is only matter of representation, for which he will not be answerable, unless it be shown to be false within his knowledge." See, also, Richardson v. Brown, 1 Bing. R. 344; Dickinson v. Gapp, cited 8 Bing. R. 50. See, also, Story on Sales, § 358, for a fuller statement of this doctrine.

as if it be in respect to the authorship of an old picture,—the description, unconnected with words of warranty, would not, of itself, constitute a warranty. And it is for a jury to determine, whether it were intended as a warranty, and so understood by the buyer.<sup>1</sup> But if there be no express warranty, and the description be of a matter in respect to which the seller has, or ought to have, knowledge, and which is susceptible of accurate and certain knowledge, it will constitute a warranty. Thus, if a picture be stated to be by a certain artist who is living, or but lately dead, the description will not be considered as a mere statement of opinion, but as a warranty.<sup>2</sup> It must be confessed, that the decisions are apparently very contradictory on this subject, but it is believed that these distinctions will nearly reconcile them.

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<sup>1</sup> Power *v.* Barham, 6 Nev. & Man. R. 62; s. c. 7 Car. & Payne, R. 356; 4 Adolph. & Ell. R. 476. In this case Lord Denman said: "I think that the case was correctly left to the jury. We must take the learned judge to have stated to them that the language of Lord Kenyon, in Jendwine *v.* Slade, was merely the intimation of his opinion upon such a contract as was then before him. It may be true that, in the case of very old pictures, a person can only express an opinion as to their genuineness; and that is laid down by Lord Kenyon in the case referred to. But the case here is, that pictures are sold with a bill of parcels, containing the words, 'Four pictures, Views in Venice, Canaletto.' Now, words like these must derive their explanation from the ordinary way in which such matters are transacted. It was, therefore, for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description, or expression of opinion. I think that their finding was right; Canaletti is not a very old painter. But, at all events, it was proper that the bill of parcels should go to the jury with the rest of the evidence." See, also, Lomi *v.* Tucker, 4 Car. & Payne, R. 15; Hill *v.* Gray, 1 Stark. R. 434; De Sewhanberg *v.* Buchanan, 5 Car. & Payne, 343; Jendwine *v.* Slade, 2 Esp. R. 573; Hough *v.* Richardson, 3 Story, R. 690; Beals *v.* Olmstead, 24 Verm. R. 114.

<sup>2</sup> Power *v.* Barham, 4 Adolph. & Ell. R. 476. See, also, Shepherd *v.* Kain, 5 Barn. & Ald. R. 240; Winsor *v.* Lombard, 18 Pick. R. 60; Hogins *v.* Plympton, 11 Pick. R. 99, and cases cited, supra. See, also, Morrill *v.* Wallace, 9 N. Hamp. R. 115; Borrekens *v.* Bevan, 3 Rawle, R. 23; and Story on Sales, § 358. But see Seixas *v.* Woods, 2 Caines, R. 48, and Swett *v.* Colgan, 20 Johns. R. 196.

§ 829. Where an express warranty is couched in technical terms, it is to be interpreted according to their technical signification, unless they be manifestly used in a different sense, and differently understood by the buyer.<sup>1</sup> What the intention is, is to be gathered from usage and custom, and constitutes a question for the jury. Thus, where a horse is warranted to be "sound," the actual extent of the warranty is to be implied from custom and usage, and the intention and understanding of the parties.<sup>2</sup>

§ 830. A general warranty does not, however, extend to patent defects, which are apparent upon careless inspection, or to defects which are at the time known to the buyer.<sup>3</sup> This doctrine stands upon the ground, that all patent defects would naturally be within the knowledge of the buyer, and therefore, the warranty cannot be presumed to have been intended to cover them.<sup>4</sup> But if the vendee did actually neglect to examine, and were unaware of the defect, or were physically unable to perceive the defect, from blindness; the seller will be bound to the full extent of the warranty, although the

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<sup>1</sup> Jones *v.* Bowden, 4 Taunt. R. 847, 852; Button *v.* Corder, 7 Taunt. R. 405; Cook *v.* Moseley, 13 Wend. R. 277. See ante, *Rules of Interpretation*.

<sup>2</sup> Lord Ellenborough did not consider "roaring" an "unsoundness," although he considered it an "unpleasant habit" in a horse. See Bassett *v.* Collis, 2 Camp. R. 523. But his lordship afterwards changed his mind. See Onslow *v.* Eames, 2 Stark. R. 81. "Crib-biting," he also held not to be unsoundness, Broeneenburg *v.* Haycock, Holt, N. P. R. 630. Whether it was an "unpleasant habit," or not, he did not vouchsafe an opinion. See Dickinson *v.* Follett, 2 Mood. & Rob. R. 299; Shillitoe *v.* Claridge, 2 Chitty, R. 425; King *v.* Price, 2 Chitty, R. 416; Wellwood *v.* Gray, Brown on Sales, 311; Watson *v.* Denton, 7 Car. & Payne, R. 85; Best *v.* Osborne, Ryan & Mood. R. 290; 1 Car. & Payne, R. 632; 2 Car. & Payne, R. 74, wherein a cough, the strangle, or "mort du chien," a bone spavin of the hock, and a nerved horse, were respectively considered "unsoundness." These questions are for the jury, however; Lewis *v.* Peake, 7 Taunt. R. 153; Atterbury *v.* Fairmann, 8 Moore, R. 32.

<sup>3</sup> Dyer *v.* Hargrave, 10 Ves. R. 505; Hudgins *v.* Perry, 7 Iredell, R. 102.

<sup>4</sup> 2 Stark. Ev. 905, note *n*, 2d ed.; Margetson *v.* Wright, 5 Moore & Payne, R. 606; s. c. 7 Bing. R. 603.

defect be patent.<sup>1</sup> If, therefore, when a bill of parcels is given, the vendee examine the articles sold, he does not thereby diminish his right to rely on that as a warranty, if the article sold be so disguised that it was difficult to ascertain whether it corresponded to the description,—or if, in fact, he did not perceive that it differed.<sup>2</sup> And even if ample opportunity be given for the examination of an article sold, and the vendee be skilled in relation to such articles, he is, nevertheless, not bound to exercise his skill, where he has the express warranty of the vendor.<sup>3</sup>

§ 830 a. It is not necessary that a warranty should be made directly to the vendee, for if the representation had been previously made by the vendor to another person in respect to the property sold, and that representation be known by the vendor to constitute the basis of a subsequent sale made by him to a third person to whom it is communicated, it would have the same effect as if it were made directly to the vendee.<sup>4</sup>

#### IMPLIED WARRANTY.

§ 831. There is scarcely a subject in the law, more perplexed and unsatisfactory than the law relating to implied warranty. The old rule of the common law in relation to sales was *caveat emptor*. To cases of express warranty this rule did not apply; and all that was necessary for the plaintiff to prove was, that the warranty was not complied with, without alleg-

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<sup>1</sup> Butterfield *v.* Burroughs, 1 Salk. R. 211; Viner, Abr. Actions, a. c. 7, z. b. 15; Bro. Abr. Deceit, pt. 29, citing 11 E. 46; 3 Black. Comm. R. 465.

<sup>2</sup> Henshaw *v.* Robins, 9 Metcalf, R. 89; Tye *v.* Fynmore, 3 Camp. R. 462; Bradford *v.* Manley, 13 Mass. R. 139; Shepherd *v.* Kain, 5 Barn. & Ald. R. 240.

<sup>3</sup> Tye *v.* Fynmore, 3 Camp. R. 462; Henshaw *v.* Robins, 9 Metcalf, R. 89.

<sup>4</sup> Crocker *v.* Lewis, 3 Sumner, R. 8. See, also, Barden *v.* Keverberg, 2 Mees. & Welsb. R. 63, 64.

ing or proving fraud.<sup>1</sup> But in cases of implied warranty, the universal form of pleading was by an action on the case, the gist of which is the wrongful act of the defendant, and not merely his breach of promise,—that action being technically an action of *tort*, and not of *assumpsit*.<sup>2</sup> In all cases, therefore, whether there were or were not fraud in point of fact, it was absolutely necessary to make an allegation of fraud in the declaration, in order to support the form and fiction of the action,—and then fraud might be implied from the circumstances, or expressly proved. If the fraud were not alleged in the pleadings, the plaintiff could not for technical reasons recover. Thus, in an action on the case, where the defendant affirmed a certain stone to be a bezoar stone, which was not, no allegation that he knew his representation to be false was made; and it was held, that there was no cause to support the action, because no fraud was alleged.<sup>3</sup>

§ 832. But, at a later period, a new modification of this rule was introduced by Lord Chief Justice Holt, which was, that where there was an intention to warrant, no formal words were necessary; and, therefore, that a warranty might be implied from the nature and circumstances of the case. The maxim then arose, that a sound price implied a warranty. This doctrine was, however, exploded by Lord Mansfield.<sup>4</sup>

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<sup>1</sup> *Pasley v. Freeman*, 3 T. R. 61.

<sup>2</sup> London Law Mag. vol. 3, p. 191. See, also, upon this subject, Story on Sales, § 364 et seq.

<sup>3</sup> *Chandelor v. Lopus*, Cro. Jac. R. 4.

<sup>4</sup> *Stuart v. Wilkins*, Doug. R. 20; *Parkinson v. Lee*, 2 East, R. 314; *La Neuville v. Nourse*, 3 Camp. R. 351. In North and South Carolina, the doctrine, that a sound price implies a warranty of soundness, has been adopted. *Missroon v. Waldo*, 2 Nott & McCord, R. 76; *Barnard v. Yates*, 1 Nott & McCord, R. 142; *Timrod v. Shoolbred*, 1 Bay, R. 324; *The State v. Gaillard*, 2 Bay, R. 19, 380; *Crawford v. Wilson*, 2 Rep. Constit. (N. S.) 353; *Galbraith v. Whyte*, Haywood, R. 464. The doctrine has been overruled in Connecticut; *Deal v. Mason*, 4 Conn. R. 428; and, indeed, is opposed to the weight of authority, which has almost universally followed the doctrine of Lord Mansfield, as stated in the text.

Soon after, the form of pleading by an action on the case was superseded by the action of *assumpsit*, the gist of which is the promise or undertaking of the vendor, and not his fraud. This new form of action led to many changes and modifications in the law, and accounts for many discrepancies and contradictions in the older cases. Ever since the action of *assumpsit* was introduced as the form of pleading upon cases of implied warranty, there has been a tendency in the common law to approximate to the rule of the Roman law, which implies a warranty, that the goods sold are merchantable, and fit for the purpose for which they are known to be bought.<sup>1</sup>

§ 833. A warranty of *title* will be presumed when the goods sold are in the possession of the vendor, whether he make any affirmation of title or not.<sup>2</sup> But where the subject-matter of sale is not in the possession of the vendor, it has been held, that no such warranty will be presumed, without an affirmation of title.<sup>3</sup> Yet the weight of opinion, as well as of reason, would seem to be against any such distinction;<sup>4</sup> for a sale of a chattel can-

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<sup>1</sup> In South Carolina, this rule of *caveat venditor* has been adopted. See *Barnard v. Yates*, 1 Nott & McCord, R. 142.

<sup>2</sup> *Coolidge v. Brigham*, 1 Metcalf, R. 551; *McCoy v. Artcher*, 3 Barbour, (Sup. Court R.) 323; *Medina v. Stoughton*, 1 Salk. R. 210; s. c. 1 Ld. Raymond, R. 593; *Adamson v. Jarvis*, 12 Moore, R. 253; *Pasley v. Freeman*, 3 T. R. 57; *Crosse v. Gardner*, Carth. R. 90; *Peto v. Blades*, 5 Taunt. R. 657; *Robinson v. Anderton, Peake*, R. 94; *Souter v. Drake*, 5 Barn. & Adolph. R. 992, 1002; 3 Nev. & Man. R. 40; *Purvis v. Rayer*, 9 Price, (Excheq.) R. 488; *Dorsey v. Jackman*, 1 Serg. & Rawle, R. 42; *Harvey v. Young, Yelv.* R. 31, (American edition,) note by Mr. Metcalf; *Trigg v. Faris*, 5 Humph. R. 344.

<sup>3</sup> See this distinction recognized in *Edick v. Crim*, 10 Barb. R. 445; *Dresser v. Ainsworth*, 9 Barb. R. 619; *Huntingdon v. Hall*, 36 Maine R. 501.

<sup>4</sup> The first case, in which this distinction is stated, is *Roswel v. Vaughan*, Cro. Jac. R. 197, which was an action brought to recover damages for a failure of title to the tithes of the vicarage at South Stoke, then in the possession of another. Tanfield, Chief Baron, said: "But here he had not any possession; and it is no more than if one should sell lands wherein

not actually take place without a change of title, and therefore the mere undertaking absolutely to sell, of itself imports

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another is in possession, or a horse whereof another is possessed, without covenant or warranty for the enjoyment; it is at the peril of him who buys, and not reason he should have an action by the law, where he did not provide for himself." Here, it will be observed, there was no affirmation of title. The rule is also stated by Lord Holt in an *obiter dictum* in *Medina v. Stoughton*, 1 Salk. R. 210, in these words: "Where one having the possession of any personal chattel sells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation; for his having possession is a color of title, and perhaps no other title can be made out; *aliter* where the seller is out of possession; for there may be room to question the seller's title, and *caveat emptor* in such case to have either an express warranty or a good title." But in the report of the same case in *Ld. Raymond*, R. 593, no such *dictum* appears; and Mr. Justice Buller, in *Pasley v. Freeman*, 3 T. R. 58, commenting on this *dictum*, says: "If an affirmation at the time of the sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because the vendee has then nothing but the warranty to rely on." The last case directly overrules the former, both the cases supposing an express affirmation of title by the vendor. The rule, therefore, that an implied warranty of title does not arise when the vendor has no possession of the goods, where there is no affirmation of ownership, thus far rests on the old case of *Roswel v. Vaughan*, decided when the strictest rules of *caveat emptor* were enforced. I am aware of no subsequent case in England, where a distinction has been made between a vendor in possession and a vendor out of possession of the subject-matter of sale. In *Adamson v. Jarvis*, 12 Moore, R. 253; s. c. 4 Bing. R. 73, where goods were sold by an auctioneer for his principal, who had no title to them, the distinction was not necessary, for the auctioneer had possession of the goods, and besides, there was a direct affirmation of ownership by the principal, creating an express warranty. The rule laid down in this case merely affirms the undisputed doctrine, that where the vendor sells goods in his possession, affirming them to be his, he warrants the title. Mr. Justice Blackstone, in his *Commentaries*, (Part 3, p. 451,) alludes to no such distinction, but thus broadly states the law: "By the civil law, an implied warranty was annexed to every sale, in respect to the title of the vendor; and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." Again, in *Purvis v. Rayer*, 9 Price, R. 488, a writ-

a warranty of title. If there be an express affirmation or assurance of ownership, it constitutes an express warranty,

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ten agreement for the sale of the lease of a house was made by an agent of the lessee, the house being in the possession of the lessee and not of the agent, except by implication, and the abstract of title not satisfying the purchaser, he declined to fulfil the agreement,—and the question arose, whether a person contracting to purchase a leasehold interest can insist on being shown that the lessor himself had a good title, and it was held, that he could. The court after great consideration, and apparently after consultation with Lord Eldon, gave the decision. The Lord Ch. Baron said: “A vendee is not bound to take a lease without being satisfied in that respect, merely because the lessee has neglected to stipulate with his lessor for that right, which would have enabled him to show the validity of his title when he should be disposed to sell his interest, and without which he ought not to oblige a purchaser to take it. It might as well be said, as it seems to me, that any other vendor of property, not his own, cannot be compelled to show a title to what he sells, if inability to do so is to be considered a valid excuse. Surely a vendee of a lease is not to lose his money because the vendor has not the means of producing his lessor's title, or to be in that respect in a different and worse situation than the purchaser of any other interest, merely because the lessee has not for his own sake taken care to provide that the lessor shall obviate the difficulty, as he might have done, by furnishing him with the means of satisfying a purchaser, in case he should require it.

“It is said, that it is now the usual course to state in the advertisement for the sale of any such property, that the title of the lessor will not be warranted. That may be so; and leases may be purchased on such terms, if purchasers are to be found who will buy them with so much rashness; but the question here is, whether a court of equity will compel a man to take a lease which he has contracted to purchase generally, and without any thing further passing between the parties, where the lessee will not or cannot show that his lessor has a good title to the subject-matter of the lease. I am of opinion that I cannot make the purchaser suffer for the laches of the vendor. The advertisement does not give him any right to put the vendee to any risk. The general doctrine of equity is against such a proposition, unless the case of leasehold property be an exception, and an anomaly with respect to all other property.” See also *Souter v. Drake*, 5 Barn. & Adolph. R. 999, in which case Lord Denman said: “For the reasons above given, we come to the conclusion, unless there be a stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity.”

by which the vendor is bound, whether the subject-matter of sale be in his possession or not;<sup>1</sup> and the only question, in

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In the late case of *Morley v. Attenborough*, Exch. R. 508, this doctrine has, however, been disputed. It is said, by Baron Parke, after a review of the old authorities on this question : “ From the authorities in our law, to which may be added the opinion of the late Lord Ch. J. Tindal, in *Ormrud v. Huth*, 14 Mees. & Welsb. R. 664, it would seem that there is no implied warranty of title on the sale of goods, and that if there be no fraud, a vendor is not liable for a bad title unless there is an express warranty, or an equivalent to it, by declarations or conduct ; and the question in each case, where there is no warranty in express terms will be whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved, as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement ; and without proof of such usage, the *very nature of the trade* may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons.” This last sentence seems to yield the whole question. Usage of trade always imports a warranty of title in all cases unless, perhaps, where the very nature of the contract or the facts of the case plainly show that the vendor does not possess the title to the subject, nor the right to sell, and that the vendor takes the risk knowingly. And if the *nature of the trade* is enough to create an implied warranty of title, every complete and absolute sale would come within the rule simply because it is a *sale*, which cannot be made by any person not having a title. In the case in which this judgment was delivered, a pawnbroker, in a sale of forfeited articles which he did not profess to own, sold a harp which had been pawned by a person who did not own it, and the owner reclaimed it of the vendee, who brought an action therefor against the pawnbroker. From the very nature of the sale in this case, it was thought that the pawnbroker could not be understood as warranting his title ; the vendee being affected with notice that the article sold had been merely forfeited upon a pledge. But we do not see why, in such a case, the innocent vendee should suffer. The vendee had trusted the pawnbroker, the pawnbroker had trusted the pawnner, and the remedy of each should be against the party trusted by him. What consideration was there to support the sale to the purchaser ? Why could he not reclaim the purchase-money on the ground of a total failure of consideration ? Any rule except the simple one, that a sale imports a warranty of title leads

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<sup>1</sup> See *Simms v. Marryat*, 7 Eng. Law & Eq. R. 330.

respect to which there is any doubt, is whether the mere act of selling, where the absolute title to the goods is intended by

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us into constant difficulties. The court go on to say, after admitting that executory contracts create an implied warranty of title: "We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor "sells as his own," and that is what is equivalent to a warranty of title. But in the case now under consideration, the defendant can be made responsible only as on *a sale of a forfeited pledge, eo nomine*. Though the harp may not have been distinctly stated in the auctioneer's catalogue to be a forfeited pledge, yet the auctioneer had no authority from the defendant to sell it except as such. The defendant, therefore, cannot be taken to have sold it with a more extensive liability than such a sale would have imposed upon him; and the question is, whether, on such a sale, accompanied with possession, there is any assertion of an absolute title to sell, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed. On this question we are without any light from decided cases.

"In our judgment, it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking any thing more than that the subject of sale is a pledge and irredeemable, and that he is not cognizant of any defect of title to it. By the statute law (see 1 Jac. 1, c. 21,) he gains no better title by a pledge than the pawn had; and as the rule of the common law is, that there is no implied warranty from the mere contract of sale itself, we think, that where it is to be implied from the nature of the trade carried on, the mode of carrying on the trade should be such as clearly to raise that inference. In this case we think it does not. The vendor must be considered as selling merely the right to the pledge which he himself had; and therefore we think the rule must be absolute.

"Since the argument, we find that there was a count for money had and received, as well as the count on the warranty, in the declaration. But the attention of the judge to the trial was not drawn to this count, nor was it noticed on the argument in court.

"It may be, that though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there is no implied warranty of title, some circumstances must be shown to enable the plaintiff to recover for money had and received. This

both parties to be conveyed, is not, by necessary implication, an affirmation and profession of ownership, creating a war-

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case was not made at the trial, and the only question is, whether there is an implied warranty."

That this doctrine is to be restricted to the actual facts of that case, will be seen by the late case of *Simms v. Marryat*, 7 Eng. Law & Eq. R. 330. Mr. Bell, also, in his Treatise on the Contract of Sale, page 95, says, "As no one can justly sell any thing without having a full title of ownership, or at least a right to dispose of the subject which he sells, he, by the act of selling, gives an implied assurance to the buyer, that he holds such powers as effectually to make the transfer to him." "This general doctrine is laid down as a necessary result of the principles of the contract by the institutional writers of all countries." Blackstone lays down the same rule, and says, "It is constantly understood that the seller undertakes that the commodity he sells is his own," 3 Black. Comm. 165. See, also, 2 Black. Comm. 451. Mr. Comyn, in his treatise on Contracts, repeats the rule in the same words, and by way of illustration, adds, "Where a man sells goods as his own, when they are the goods of a stranger, an action lies against him without an express warranty." In *Doe & Gray v. Stanion*, 1 Mees. & Welsb. R. 701, it is said, "In contracts for the sale of real estate the agreement to make a good title is always implied." *A fortiori*, this would be true of personal property.

In this country, Mr. Chancellor Kent in his Commentaries, (Vol. 2, Lect. xxxix. p. 478,) states the distinction, and says: "In every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril. But if the seller has possession of the article, and he sell it as his own, and not as agent for another, and for a fair price, he is understood to warrant the *title*." The cases relied upon by him in support of this doctrine, are *Roswel v. Vaughan*, Cro. Jac. R. 197, and *Medina v. Stoughton*, 1 Salk. R. 210, which we have considered above. In the note, however, he says of Mr. Justice Buller's comment on the latter case, overruling it, in *Pasley v. Freeman*, 3 T. R. 57, "There is good-sense and equity in the observation." His statement therefore stands on the old case of *Roswel v. Vaughan*. But he goes on to say "a fair price implies a warranty of title, and the purchaser may have a satisfaction from the seller, if he sells the goods as his own, and the title proves defective. The distinction between the responsibility of the seller as to the title and as to the quality of the goods sold, is well established in the English and American Law." In *Gookin v. Graham*, 5 Humph. (Tenn.) R. 480, the court say:—"In a sale of personal property there is always an implied warranty of title, unless it be purchased under such circumstances as clearly show that the vendee intended to risk the title; as if the vendor be

ranty thereof. Of course, no warranty of title will arise by implication, where it is expressly or impliedly negatived

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not in possession, but *the same be held adversely* by another." Undoubtedly, where the circumstances indicate that the vendor does not intend to warrant, and that the vendee *takes the risk* of the title, there would be no warranty. Still the question remains, whether, in the absence of all circumstances importing a refusal to warrant the title, such as an *adverse* holding by a third person, of which the vendee has notice, the fact that goods are not in the possession of the vendor, *of itself*, absolves the vendor from an implied warranty of title. The rule laid down in this case would seem to indicate that it does not. Certainly the mere fact, that the goods are in the possession of a third person, does "not *clearly* show, that the vendee intended to risk the title," although if the goods be held *adversely*, and the vendee know such fact, it might have such an effect.

The only case in which the distinction between sales of goods in the possession of the vendor, and sales of goods out of his possession, has formed the basis of an adjudication in this country, is *McCoy v. Artcher*, 3 Barbour, Sup. Ct. R. 323. In this case, the very point under discussion is fully and elaborately examined, and the learned judge concludes, after commenting upon the cases, in favor of the distinction stated by Lord Holt. He says:—"I find no case, either in Great Britain or in this country, sustaining the position that a vendor, who makes no affirmation or representation on the sale of a chattel in the possession of a third person, can be held liable for a failure of title, on an implied warranty. On the contrary, when any reason is given for the rule, the possession of the vendor is, even in the cases cited by Story, evidently regarded by the courts as the foundation of the implied warranty of title." "The maxim with regard to sales is, *fides servanda*; and if there be no express contract of warranty, general rules of implication should be adopted with this maxim constantly in view. A warranty should only be implied when good faith requires it. I think it is fair and equitable to hold that the possession of the vendor is equivalent to an affirmation of title, and that in such case the vendor shall be held to an implied warranty of title, though nothing be said on the subject between the parties. But if the property sold be, at the time of the sale, in the possession of a third person, and there be no affirmation or assurance of ownership, no warranty of title should be implied. If, however, there be an affirmation of title where the vendor is not in possession, the vendor should be subject to the same liability as if he had the possession of the property. We have not, on this subject, adopted the civil law rule *caveat venditor*; but the rule of the common law, *caveat emptor*, is our law." The final decision of the case does not seem to have turned wholly on this question, for it appears, and is stated by the learned judge, that there are

by the vendor.<sup>1</sup> And there may also be cases where the seller from his very character and position in relation to the

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circumstances tending strongly, if not conclusively, to show, that "the property" was purchased by the vendor "at his own risk."

But this decision, able and elaborate as it is, does not fully recommend itself on principle, and must be difficult of application. The only case by which it is supported is that of *Roswel v. Vaughan*, Cro. Jac. 197, which was decided as long ago as 1607, when the doctrine of *caveat emptor* was much sterner in its operation than it now is, and when the form of action on a warranty was in *tort* and not in *assumpsit*, the latter form being adopted at a later day. This very case was "an action on the case in the nature of deceit," and the ground upon which the argument and decision proceeds is, that there is no evidence or indication of *tort* or *deceit* by the seller, without which, he would not, by the form of the action be liable. So, also, *Crosse v. Gardiner*, 1 Shower, R. 68, and *Furnis v. Leicester*, Cro. Jac. 474; *Medina v. Stoughton*, 1 Salk. R. 211, are all actions on the case. So, also, *Pasley v. Freeman*, 3 T. R. 58, was an action in the nature of a writ of deceit. Indeed, nearly all the old cases are of this kind.

The introduction of *assumpsit* as the true form of declaring on a warranty, (see *Stewart v. Wilkins*, Douglas, R. 18,) avoided the necessity of proving deceit or fraud, and threw the basis of the claim upon the promise of the defendant. Then arose the doctrine of *implied warranty*, limiting the old rule of *caveat emptor*, which before always obtained, except in cases of *express warranty* or *deceit*. Under the previous course of pleadings, whether the seller were out of possession or in possession, if there were no affirmation operating to deceive, no action could be maintained. If there were an affirmation, the seller being in possession, it was considered as an assumption of fraud, because the vendee might have no means of examining into the title, and the circumstances of the case indicated no adverse rights. But where the vendor was out of possession, no such presumption of fraud arose, because it was considered as being too violent. The bare assumption of ownership without possession, being evidently not so strong a badge of fraud as an assumption of ownership with possession. Therefore, in the latter case, the vendee was bound to prove fraud. Yet, even in these cases, Mr. Justice Buller says: "If an affirmation at the time of the sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and if there be any difference, it seems

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<sup>1</sup> *Spratt v. Jeffery*, 10 Barn. & Cres. R. 249; *Rodrigues v. Habersham*, 1 Speer, S. Car. R. 314; *Smith v. The Bank of South Carolina*, Riley's Ch. R. 113; *McCoy v. Artcher*, 3 Barbour, Sup. Ct. R. 323; *Purvis v. Raycer*, 9 Price, R. 488; *Earley v. Garrett*, 9 Barn. & Cres. R. 928.

goods would necessarily be understood not to warrant the title; as in the case of a pawnbroker who sells goods pawned,

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to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases then are so far from being authorities against the present action, that they show that, if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit." *Pasley v. Freeman*, 3 T. R. 58. Circumstances which afford a presumption of *fraud* may, however, well be required to be more stringent than those creating a presumption of *title*.

But in the action of *assumpsit* no *fraud* need be proved or alleged, the *gist* of the action being the promise or undertaking of the defendant. The question is, then, whether, when a person undertakes absolutely to sell an article, he impliedly asserts that he has a title to it. Undoubtedly, he agrees to sell something, and the purchaser agrees to buy something. But if he have no title he sells nothing, and the purchaser buys nothing. The implication of title is necessary to the very existence of the contract. It is the very groundwork of the whole undertaking. Such being the case, we confess ourselves to be utterly at a loss to perceive the ground of any distinction between his undertaking to sell goods in his possession, and to sell goods in the possession of a third person, and are in the same predicament with Mr. Justice Buller. Indeed, the reasoning of that eminent judge perfectly recommends itself to us. "And if there be any distinction, it seems that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the (implied) warranty to rely on." Whether the warranty be express or implied, the reasoning is the same. The vendor undertakes to *sell* goods out of his possession. Now, unless he has a title, he cannot sell them, except as agent for one who has a title. Therefore, if he sell them, he asserts his title by the simple fact of sale. Can it be said, that the mere fact of the goods not being in his possession creates an agreement on the part of the vendee to take the risk of title, the vendee having no knowledge or notice of *adverse* claims by such third person or by any other person? This, certainly, would be a very violent and injurious implication, and one which certainly ought not to supersede the natural and necessary implication of title growing out of the vendor's undertaking to sell. There may be undoubtedly cases where there are other circumstances indicating that the vendee assumed the risk, but the mere fact of non-possession cannot legitimately lead to such an inference. Indeed, it would seem, that it ought, on general principles, to be the duty of the vendor to advertise the vendee of any adverse claim, or directly to disclaim any warranty of title, if he would avoid a liability therefor. Mere silence is a representation of title in a person who sells goods.

Besides, who should properly suffer in such a case? The innocent vendee,

and who neither pretends to be owner and to take any responsibility in respect to the title, nor is considered as so

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who has supposed, most naturally, most necessarily, that the seller had a title or right to sell, and who has paid a full consideration therefor, or the vendor, who has sold what he had no right to sell, and has pocketed the full price? The equities of the case are manifest.

That the affirmation of title is a natural implication from the selling, is evident. Suppose one person should ask of another, who is selling him goods, whether he will warrant that the goods belong to him? Would it not seem an extraordinary, nay, almost an insulting question?

When it is considered that the mere sale of provisions creates an implied warranty as to wholesomeness, on the ground "that it may be presumed, that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food implies this, and it may be readily presumed that a common vendor of articles of food, from the very nature of his calling, knows whether they are unwholesome and unsound or not," (per Mr. Chief Justice Shaw, in *Winsor v. Lombard*, 18 Pick. R. 57,) and that an implied warranty arises in the case of a manufacturer against any latent defect, (see post, § 838,) because of the necessary trust reposed in the vendor,—surely, for the same reasons, a warranty of title ought to be implied.

Again, when goods not in the possession of the vendor are sold, and they turn out not to be his property, the sale must be founded either on *mistake* or *fraud*, for either the seller supposed he had a right to sell the title, when he had not, which is a *mistake* going to the essence of the contract, and affording a sufficient ground for the vendee to avoid the sale and recover his money advanced thereon, (see *Allen v. Hammond*, 2 Sumner, R. 394,) or if the vendor knew that the title was disputed, or that he had no title or right to sell, and did not notify the fact to the vendee, it would be a direct *fraud*, for which the vendee could recover. Considered in this light, it would make no difference whether the goods were in the possession of the vendor or not. See *Hammond v. Allen*, 2 Sumner, R. 394, and s. c. 11 Peters, S. C. R. 71; *Hitchcock v. Giddings, Daniell*, R. 1.

Again, public policy is against such a distinction. In the large transactions of commerce, goods are very frequently not in the hands of the vendor, but stored elsewhere. It often occurs, that goods are sold while at sea, and that unladen cargoes are sold while in the possession of the master, or goods in a manufactory or warehouse are sold by a factor or broker having no possession of them. To hold, in all such cases, that there is no implied warranty of title, would be most injurious, and would offend against the long-established usages and customs of trade.

There is also another reason against this distinction, and that is its indefiniteness. What is possession? And when may goods be considered in pos-

doing. In such a case there would be a reciprocal understanding that the risk of title was taken by the buyer.

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session, and when out of possession? May any third person be considered as the bailee of the vendor, or only any third person holding without adverse claim on his part? Or if such third person hold as bailee of the vendor, supposing the right of title to be in his vendor, and it turn out that a fourth person has the real title, does the vendor hold constructive possession by his agent or not? It is easy to see, that complicated questions may arise on this subject in respect to which it is difficult to lay down any clear rule, which will be applicable to every case.

It would seem that a vendee ought to know his title, because he alone has the full means of knowledge; and assuming as he does the ownership of goods by selling them, the vendee must depend on that assumption; because, in most cases, it would be impossible for him to inform himself. It is true, that he may demand an express warranty, but in the carelessness, rapidity, and extent, of commercial transactions, a supposition of want of title would not naturally occur to the vendee, unless there were circumstances indicating a want of title, additional to mere want of possession. And if it do not occur to him, ought he to suffer a direct wrong? The payment of a full price has at times been held to import a warranty of quality; certainly it should import a warranty of title.

There is also another reason against this distinction. Whether goods be out of possession or in possession, the utter failure of title is an utter failure of consideration, and the contract thereby becomes voidable. See ante, § 480.

In conclusion, the broad doctrine laid down by Blackstone, that "a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose," (2 Black. Comm. 451,) seems the true one, for, as he says, in another place, "it is constantly understood that the seller undertakes, that the commodity he sells is his own." 3 Black. Comm. 165. In Coolidge v. Brigham, 1 Metcalf, R. 551, Mr. Justice Wilde says: "In contracts of sales, a warranty of title is implied. The vendor is always understood to affirm that the property he sells is his own. And this implied affirmation renders him responsible, if the title proves defective. This responsibility the vendor incurs, although the sale may be made in good faith, and in ignorance of the defect of his title. This rule of law is well established, and does not trench unreasonably upon the rule of the common law, *caveat emptor*. The possession of personal property is *primâ facie* evidence of title; and in many cases it would be difficult, if not impossible, before the sale, to discover the defect of title." The rule is broadly laid down here, and no distinction is made between goods in and out of the vendor's pos-

The same rule would apply to the sale of a chattel by a sheriff on execution, and to all sales by an executor, adminis-

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session, unless the last sentence is to be understood as restricting all the preceding statements. The court evidently did not consider such a distinction to create any difference of liability, for if it had, the distinction would have been stated.

Again in *Strong v. Barnes*, 11 Verm. R. 221, where a carding machine, not in the possession of the vendor, was sold by a written contract of sale, without warranty of title contained therein ; but it appeared, that the vendor had in conversation affirmed that he had such a machine, upon doubts being expressed by the vendee ; it was held, "that the bill of sale amounted to a warranty that the defendant was owner." See, also, *Harvey v. Young*, Yelv. R. 31, American edition, and note by Mr. Metcalf. In *Defreeze v. Trumper*, 1 Johns. R. 274, where a horse was sold by the plaintiff as executrix in her own wrong, and the administrators recovered the value of the horse of the vendee,—the court said : " We are of opinion that an express warranty was not required ; for it is a general rule, that the law will imply a warranty of title upon the sale of a chattel." And the rule as stated in Blackstone's Commentaries, (vol. 2, p. 451,) is expressly affirmed *totidem verbis*. See, also, *Murray v. Judah*, 6 Cowen, R. 491, and *Heermane v. Vernoy*, 6 Johns. R. 5, where the court say : " Every man is considered as warranting the title of personal property which he sells, though there be no express warranty for that purpose." See, also, *Rew v. Barber*, 3 Cowen, R. 280 ; *Chancellor v. Wiggins*, 4 B. Monroe, 201 ; *Sibley v. Beard*, 5 Geo. R. 550 ; *Colcock v. Goode*, 3 McCord, R. 513. In *Swett v. Colgan*, 20 Johns. R. 202, Mr. Justice Woodworth, after stating that an affirmation as to quality, though made at the time of the sale, must be intended as a warranty, in order to render the vendor liable, goes on to say : " With respect to the *title* to the goods sold, an express warranty is not necessary ; for it is a general rule, that the law will *imply* a warranty of title." See, also, note to this case in the second edition, (1839). See, also, Mr. Metcalf's note to *Yelverton's R. 21 b*, and *Chism v. Woods*, Hardin, R. 531 ; *Hilliard on Sales*, sect. x. p. 258 ; *Payne v. Rodden*, 4 Bibb, R. 304.

In *Vibbard v. Johnson*, 19 Johns. R. 78, the court say : " There is no doubt that in every sale of a chattel for a sound price, there is a tacit and implied warranty, that the vendor is the owner and has a right to sell." See, also, *Case v. Hall*, 24 Wend. R. 103. In *Blasdale v. Babcock*, 1 Johns. R. 518, which was an action on the case in an *implied warranty* in the sale of a horse, the judge charged the jury, that the defendants, by the sale of the horse, warranted it to be his property, and upon a new trial the charge was supported by the whole court. In *Payne v. Rodden*, 4 Bibb, (Kentucky,) R. 304,

trator, or trustee; for as they do not profess to sell the goods as their own, but expressly as belonging to another person,

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where there was no affirmation of title, the court say: "Although a seller is not presumed to undertake for the soundness of goods which he sells, yet with respect to a chattel in the possession of the vendor, it is settled by a current of authority, that there is an implied warranty of title. Here, however, the fact of possession is recognized." In *Mockbee v. Gardner*, 2 Harr. & Gill, R. 177, the court say: "It is a general and familiar principle that exists in every sale of personal property, an implied warranty of title." In *Ritchie v. Summers*, 3 Yeates, R. 531, Smith, J., says: "The act of selling chattels is such an affirmation of property, that *on that circumstance alone*, if the fact should turn out otherwise, the value can be recovered from the seller. It is constantly understood that the vendor undertakes that the commodity he sells is his own." In *Boyd v. Bopst*, 2 Dall. R. 91, the same statement is made in the same words. In *Willing v. Peters*, 12 Serg. & Rawle, R. 181, the court say: "On the sale of personal property there is an implied warranty by the vendor, unless the agreement be to the contrary." See, also, *Dorsey v. Jackman*, 1 Serg. & Rawle, R. 44, and opinion by President Roberts in note; *Lanier v. Auld*, 1 Murphy, R. 138; *Dean v. Mason*, 4 Conn. R. 428. Since the publication of this note in the previous edition, in the late case of *Smith v. Fairbanks*, 7 Foster, (N. H.amp.) R. 521, Mr. Justice Woods clearly enunciates the doctrine of the text as follows: "It was contended that here was no warranty shown, and consequently no interest. In order to imply a warranty of title, however, it is necessary only that the seller should sell the property as his own. That is equivalent to an affirmation that he holds the title which implies a warranty. To sell property as one's own can mean nothing else than that it was sold with the understanding of both parties, that the title of the property was in the seller." After examining the dictum as to sales in the possession and out of the possession of the vendor, he continues: "In this case it would seem probable that a fair price was paid for the cow, if that can make any difference. The contrary is not shown. We, however, do not give any particular force to that circumstance. The cow was sold as the property of the witness. That as we regard it, is the material fact. Such a sale implies warranty of the title. The price, so far as it is to have force, is for the reason that it tends to show a probable intention to sell the entire property of the chattel. No doubt then exists, we think, that if the title should prove deficient, the witness, in this case, would be answerable as upon a warranty of title, for the price paid and the reasonable costs of this litigation. We think the mere fact of want of possession in the seller, at the time, who sells the chattel as his own property, can make no difference in relation to the warranty. The only thing which gave rise to such an idea was the

they are only bound to entire good faith, and are not understood to warrant their title longer than the purchase-money

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*dictum* of Lord Holt, not probably assented to by Lord Raymond, and distinctly repudiated by Buller, J.; and although stated by Kent as the rule, in his first edition, where the sale is made of one's own property, yet modified in the fourth in the case of a sale of the chattels as one's own property." In Huntingdon *v.* Hall, 36 Maine R. 501, however, it is laid down by the court, that a warranty of title will only be implied where the goods sold are in the possession of the vendor, and not where they are out of his possession. The cases relied upon to support this doctrine are Morley *v.* Attenborough, (3 Wils. Hurls. & Gord. R. 512,) which, as we have seen, was a pawnbroker's sale, where the goods were not sold as belonging to the seller, but the contrary; McCoy *v.* Artcher, (3 Barb. R. 323,) in which the doctrine is clearly laid down; and Russell *v.* Richards, (1 Fairf. R. 433,) where it is implied.

In Dresser *v.* Ainsworth, 9 Barb. S. C. R. 620, the court clearly lay down the contrary doctrine. Welles, P. J., says: "It is a principle of law that in every sale of personal property there is an implied warranty, by the vendor, of title in himself. (Chitty on Cont. 133; 2 Bl. Comm. 451; 3 Ib. 166; De-freeze *v.* Trumper, 1 Johns. R. 274.) These authorities only go to the extent of showing, that in such sale, the vendor impliedly warrants that he is the owner of the goods and has good right to sell. They do not settle the question whether the warranty, in such case, extends to a prior lien or incumbrance. In the present case, William A. Beach, if the property was his, or if, as he swears, it was his father's, and he was authorized by his father to sell it, had a right in either case to sell it to the defendant, and the general property would pass, notwithstanding the lien of the execution. The question then is, whether the rule referred to, extends the implied warranty to such lien. The rule is borrowed from the civil law, as appears by Sir William Blackstone, in his Commentaries. (2 Bl. Comm. 451.) On looking into Domat, I find the rule, as established by the civil law, extends the warranty to liens and incumbrances, as well as to the title. (Domat's Civil Law, 75, 76, Book 1, tit. 2, Of the Contract of Sale, § 10, Of Eviction and other troubles to the purchaser.) The essence, then, of the contract of warranty in the present case was, that the vendor had a perfect title to the goods sold, at the time of the sale; that the same were unincumbered, and that the vendee should acquire, by the purchase, a title free and clear, and should enjoy the possession without disturbance by means of any thing done or suffered by the vendor. It was, therefore, immaterial, whether the defendant knew of the levy at the time he purchased. He had a right to rely upon the warranty; and having been evicted, his right of action was complete upon Beach, so far as this point is concerned.

"One part of the plaintiff's position in the exception under consideration

remains in their hands or under their control. These cases, however, stand upon peculiar grounds not applicable to the ordinary cases of sale, and it must clearly appear that no personal trust in respect to the title was understood by both parties to be reposed in the vendor.<sup>1</sup> The rule may, therefore,

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was, that if the defendant knew of the levy, there was no fraud practised upon him. William A. Beach had testified that when he sold the property to the defendant, he told him there was a levy on it, but that he did not think it was good. If the question of the defendant's knowledge of the levy was material in that aspect, the circuit judge should have so advised the jury, as requested. But the gravamen of the defence was not that a fraud had been practised upon the defendant, but that the consideration of the note had failed; and I think, therefore, the question of fraud, in view of the objection, was entirely immaterial, and that no error was committed by the judge in declining to charge as requested, in this respect."

In Edeck *v.* Crim, 10 Barb. R. 447, however, Gridley, J., says: "Though the general rule is that the vendor of a chattel impliedly warrants the title, yet when the chattel is not in the vendor's possession, but in that of another, this rule does not prevail. In such case the party buys at his own peril, unless there be an express warranty." The authorities cited for this doctrine are 2 Kent, Comm. 478; Cro. Jac. 197. The doctrine of the latter case, as we have seen, was repudiated by Buller, J., in the case of *Pasley v. Freeman*. See, also, Chancellor Kent's note to the passage cited, entirely qualifying the rule stated by him in the text.

See an elaborate article in the American Reporter, vol. 11, p. 272, by Albert Pike, Esq., in which he argues that the Roman and the common law give only a warranty of right of undisturbed possession, but not of title. He does not, however, seem to have attended to the distinction in the Roman law between contracts of exchange (*permutatio*), or executory contracts of sale (*do ut des*), and executed sales (*emptio et venditio*), in the former two of which the Roman law certainly implies a warranty of title. Post, § 833 d. And see, on the contrary, an elaborate article on warranty in 12 American Jurist, p. 311.

The great length which this note has reached must find its justification or apology in the interest of the question and the doubtful position it still continues to hold in the common law.

<sup>1</sup> As to pawnbrokers, see *Morley v. Attenborough*, 3 Welsb. Hurlst. & Gord. (Excheq.) R. 508. As to executors, administrators, and trustees, see *Ricks v. Dillahunt*, 8 Porter, R. 134; *Forsythe v. Ellis*, 4 J. J. Marsh. R. 298; *Mockbee v. Gardner*, 2 Harr. & Gill, R. 176. But see *Cripps v. Reade*, 6 T. R. 606. As to sheriffs' sales, see *Peto v. Blades*, 5 Taunt. R. 167; *Hensley v. Baker*, 10 Missouri R. 157; *Chapman v. Speller*, 19 Law Jour. (N. S.) Q.

be laid down that whenever a person sells goods *as his own*, without notice, express or implied, that they belong to another, or that his title is doubtful or defective, a warranty of title is implied by the fact of sale. Where such notice is either express or implied necessarily from the facts of the case, or the character of the seller in relation to the goods, the purchaser is supposed to take the risk.

§ 833 *a.*<sup>1</sup> In equity, a warranty of title is always implied, and the vendor cannot enforce a specific performance on total failure of title, nor indeed on a partial failure which goes to the essence of the consideration.<sup>2</sup> In such a case, also, the contract would, on application to a court of equity, be set aside, on the ground of mistake.<sup>3</sup> Yet if the vendee choose, he may, on a failure of title as to a part, generally, insist on a specific performance in respect to the part to which a good title can be made, with a corresponding abatement of price, if the difference of value be susceptible of determination.<sup>4</sup>

§ 833 *b.* In an executory contract of sale, the vendee may

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B. R. 239; *Yates v. Bond*, 2 McCord, R. 382; *Friedly v. Sheetz*, 9 Serg. & Rawle, R. 156. See, also, *Dresser v. Ainsworth*, 9 Barb. S. C. R. 620; *McCoy v. Artcher*, 3 Barb. S. C. R. 323; *Adamson v. Jarvis*, 4 Bing. R. 66.

<sup>1</sup> This section, together with succeeding six sections, is taken from my treatise on sales. Despite the repetition that this course occasions, it was thought advisable, on account of the doubt still hanging over the question of warranty of title, and also because the other work may not always be at hand to consult. The treatise on sales, it may not be improper to say, will be found to be much fuller on all questions relating to sales than the abstract of the subject in the present treatise.

<sup>2</sup> *Graham v. Oliver*, 3 Beav. R. 121; *Roffey v. Shallcross*, 4 Madd. Ch. R. 227; *Dalby v. Pallen*, 3 Simons, R. 29; 1 Story, *Equity Jurisp.* § 778, 779, and cases cited.

<sup>3</sup> 1 Story, *Equity Jurisp.* § 143 *a*, § 161, and cases cited. See, also, *Gillespie v. Moon*, 2 Johns. Ch. R. 585; *Allen v. Hammond*, 11 Pet. R. 71; *Roffey v. Shallcross*, 4 Madd. Ch. R. 227. *Ante*, § 155.

<sup>4</sup> *Thomas v. Dering*, 1 Keen, Ch. R. 729; *Mortlock v. Buller*, 10 Ves. R. 315; *Paton v. Rogers*, 1 Ves. & Beam. R. 351; *Hill v. Buckley*, 17 Ves. R. 395; *Milligan v. Cooke*, 16 Ves. R. 1; *Dale v. Lister*, 16 Ves. R. 7.

refuse to accept the article sold unless the vendee make him a clear title;<sup>1</sup> and, if he have advanced the purchase-money, he may, upon discovery of a total failure of title, rescind the contract and recover back his advances in an action of assumpsit for money had and received.<sup>2</sup> But where the sale is consummated, and the article delivered and accepted, it does not seem to be quite settled in this country, whether the vendee may bring a special action of assumpsit on the warranty, so long as his title and possession are undisputed. The stronger opinion would seem to be that he cannot; upon the ground, that the owner may never enforce his claim, or if he do, the vendor may settle with him, in either of which cases, there would be no breach of warranty to support the action.<sup>3</sup> A judicial eviction would not, however, be necessary, provided a clear title be apparent in the claimant. Nor, indeed, would the vendee, on general principles, seem to be bound to support the expense of defending a suit,—but upon suit being brought, he would seem to be entitled to abandon the thing, and to insist on the seller's warranty, or to call upon him to defend the suit.<sup>4</sup> Yet if there be any affirmation of ownership,

<sup>1</sup> Purvis *v.* Rayer, 9 Price, R. 488; Chambers *v.* Griffiths, 1 Esp. R. 150; Souter *v.* Drake, 5 Barn. & Adolph. R. 999; Judson *v.* Wass, 11 Johns. R. 528; Clute *v.* Robison, 2 Johns. R. 613; Talmadge *v.* Wallis, 25 Wend. R. 117.

<sup>2</sup> See post, § 423; Morley *v.* Attenborough, 3 Welsb., Hurls. & Gord. (Excheq.) R. 514; Farrer *v.* Nightingal, 2 Esp. R. 639; Cripps *v.* Reade, 6 T. R. 606; Shove *v.* Webb, 1 T. R. 732; Johnson *v.* Johnson, 3 Bos. & Pull. R. 162; Chambers *v.* Griffith, 1 Esp. R. 150; Berry *v.* Young, 2 Esp. R. 640, note; Picketon *v.* Litecote, 21 Viner's Abr. tit. Vendor and Vendee (B); Robinson *v.* Anderton, Peake, R. 94; Camfield *v.* Gilbert, 4 Esp. R. 221; s. c. 3 East, R. 516.

<sup>3</sup> The rule is thus laid down in Case *v.* Hall, 24 Wend. R. 103; and Vibbard *v.* Johnson, 19 Johns. R. 79; Brown *v.* Reves, 19 Martin, (Louis.) R. 235. It is also the rule of the Roman law, post, § 367, c. But the opposite doctrine is asserted in Scott *v.* Scott's Adm'rs, 2 A. K. Marshall, (Kentucky) R. 218; and Payne *v.* Rodden, 4 Bibb, (Kentucky) R. 304; Chancellor *v.* Wiggins, 4 B. Monroe, R. 201.

<sup>4</sup> See Bell on Sales, p. 95. Domat, Civil Law, Part I. Book I. tit. 2, sect. 10, art. iii. (Strahan's translation) art. vi. Ib. art. xxii.

though there be strictly no express warranty of title, the law will import a technical deceit, so as to support an action on the case at once.<sup>1</sup> And if there be actual fraud, the seller knowing the goods sold not to belong to him, an action on the case would immediately lie on the discovery of it.<sup>2</sup> So, also, fraud is admissible by way of defence to reduce or extinguish a claim for the purchase-money.<sup>3</sup>

§ 833 c. Where an action is brought in an executory contract to recover advances, or on an executed contract after eviction, it is not necessary to prove fraud on the part of the vendor; he is equally liable, although he act in good faith and in ignorance of any defect in his title. But where an action on the case is brought, deceit is the ground of the claim and it must be made out; if this simple rule be kept in view, it will serve to explain the ground upon which the early cases were decided, the apparent confusion between them and later cases, growing mainly out of the pleadings and form of action.

§ 833 d. The doctrine of the Roman law in respect to warranty of title, though different in terms from the common law, was in substance the same. In the contract of *do ut des*, which was nothing more than what is called in the common law an executory contract, a warranty of title or proprietorship was implied, and the money paid could be at once recovered, on failure of the title, and before eviction or disturbance of possession by the owner. “Dedi tibi pecuniam, ut

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<sup>1</sup> Bacon, Abr. Action on the Case, tit. D. Cross *v.* Gardner, 1 Shower, R. 68; Furnis *v.* Leicester, Cro. Jac. R. 474; Pasley *v.* Freeman, 3 T. R. 58; Case *v.* Hall, 24 Wend. R. 103; Vibbard *v.* Johnson, 19 Johns. R. 79; Modina *v.* Stoughton, 1 Salk. R. 210; Ib. 1, Ld. Raym. R. 593; Springwell *v.* Allen, 2 East, R. 448 n.; Dale's Case, Cro. Eliz. R. 44; Peto *v.* Blades, 5 Taunt. R. 657; Adamson *v.* Jarvis, 4 Bing. R. 66.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.; Case *v.* Hall, 24 Wend. R. 103; Becker *v.* Vrooman, 13 Johns. R. 302.

mihi Stichum dares. Finge, alienum esse Stichum, sed te tamen eum tradidisse; repetere à te pecuniam potero, quia hominem accipientis non feceris.”<sup>1</sup> So, also, in the contract *permutatio*, or exchange, the same warranty was implied.<sup>2</sup> But in an immediate sale, consummated on both sides, which is the real meaning of the terms *emploi* and *venditio* in the Roman law, the seller was only understood to warrant to the vendee the absolute right to retain undisputed possession and enjoyment of the thing sold. “Venditorem hactenus tenetur, ut rem emptori habere liceat, non etiam ut ejus faciebat;”<sup>3</sup> that is, as we should say in the common law language, it was a warranty of title, upon which no recovery could be had until the vendee’s right of possession and enjoyment was attacked or title was questioned. By the practice of the Romans, the vendee had the right of denouncing or notifying to the seller the action brought against him, and leaving to him the defence of the suit, but he could not bring an action against him on the warranty, until condemnation was passed by the court.<sup>4</sup> By the French practice, however, the vendee may sue the vendor upon his warranty, as soon as any adverse claim is made, or there is any interference with his enjoyment of the thing purchased.<sup>5</sup> Again, in case of fraud,—as where the seller knew the article sold belonged to another,—he became immediately liable, although the possession of the vendee was undisturbed.<sup>6</sup>

<sup>1</sup> Dig. Lib. xii. tit. iv. De Conditione causa, § 16; Celsius. libro iii. Degestorum.

<sup>2</sup> Dig. Lib. xix. tit. iv.; De rerum permutatione.

<sup>3</sup> Dig. Lib. xix. tit. 1, § 30.

<sup>4</sup> Cod. de Evict., lib. 8, tit. 45; Pothier, Contrat de Vente, § 108; Caillet ad. tit. Cod. de Evict., lib. 8, tit. 40.

<sup>5</sup> Domat, part 1, book 1, tit. 2, sect. x. art. 6; Bell on Sales, 95; Pothier, Contrat de Vente, § 108.

<sup>6</sup> Si sciens alienam rem ignorantis mihi vendideris, etiam, prius quam evinatur, utiliter me ex empto acturum putavit in id, quanti meā intersit meam esse factam; quamvis enim alioquin verum sit, venditorem hactenus teneri, ut rem emptori habere liceat, non etiam ut ejus faciat, quia tamen dolum malum abesse præstare debeat, teneri cum, qui sciens alienam, non suam ignorantis

§ 833 *e.* In respect to this warranty of title or possession, the difference between the common law and the Roman law from which it was borrowed, is almost purely verbal and formal. It was implied in the Roman law in all cases of immediate or executory contracts of sale, and in exchanges, whether there were any affirmation of ownership or not. “*Quod si nihil convenit, tunc ea præstabuntur quæ naturaliter insunt hujus judicii potestate, et imprimis ipsa rem præstare venditorem oportet; id est, tradere; quæ res, siquidem dominus fuit vendor, facit et emptorem dominum; si non fuit, tantum evictionis nomine venditorem obligat.*”<sup>1</sup> “*Non dubitat etsi specialiter vendor evictionem non promiserit, re evictâ exempto competere actionem.*”<sup>2</sup>

§ 833 *f.* The subtle distinction between an exchange and a sale which created a warranty in the former contract, so as to give an immediate right of action before possession was disputed, while by the latter contract, the warranty was not considered as broken, until possession by the vendee was disputed, has never been admitted in our law. Whatever may be its metaphysical correctness, it is too fine for practical purposes. All sales are in reality exchanges, money being merely representative. The difference, however, practically, only relates to the time when the remedy of the vendee attaches,—the distinction in other respects between a transfer of proprietorship and of undisputed possession, being merely metaphysical. It was even a matter of dispute among the Romans themselves, whether there was any true foundation for this distinction between an exchange and a sale. Sabinus and Cassius, the leaders of the Sabinian sect, thought that an exchange was nothing else than the ancient form of sale, and that the same

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vendidit. *Dig. de Actionibus Empti et Venditi*, lib. xix. tit. 1, lex. 30, § 1. See, also, *Lib. xix. tit. 1, art. xi. § 1.*

<sup>1</sup> *Dig. Lib. xix. tit. i. art. xi. § 1. De Actionibus Empti et Venditi.*

<sup>2</sup> *Cod. Lib. viii. § 6. De Evict. Domat on the Civil Law, Part 1, Book 1, tit. 2, sect. 10, art. 6. Ibid. Cushing's ed. of Strahan's Translation, vol. 1, p. 231, § 376.*

rules applied to both contracts. This opinion also Caillet supports in his Commentary on the Code.<sup>1</sup> Nerva and Proculus, the founders of the school of the Proculæans, on the contrary, maintain that the contracts are distinct, and their opinion is supported by Justinian, Paul, and others, and generally prevailed.<sup>2</sup>

§ 833*g*. But no such distinction as that proposed in the common law between the sale of articles in the vendor's possession and of those out of his possession, ever was recognized in the Roman law. The warranty, whether of possession or of proprietorship, was always created by implication from the fact of sale or exchange, or *do ut des*, and did not depend upon the question whether the article was in the possession of the vendor. The Roman law was often metaphysical in its distinctions, but not arbitrary.

§ 833*h*. The Civil Code in France would seem to settle this question by the simple statement "La vente de la chose d'autrui est nulle; elle peut donner lieu à des dommages-intérêts lorsque l'acheteur a ignoré que la chose fût à autrui."<sup>3</sup> The necessary inference from such a statement would seem to be, that the want of power to pass the proprietorship to the vendee annulled the sale. Yet so strong a hold had the Roman practice taken upon the French mind, that, despite this statement in the Code, it has been maintained, that a sale carries only a right of possession to the vendee, not a right of proprietorship. Toullier supports this doctrine,<sup>4</sup> and it has received countenance from the court of cassation.<sup>5</sup> But

<sup>1</sup> Meermanni Thesaurus, vol. 2, ad L. 5, d. tit.

<sup>2</sup> Justin. Instit. de Empt. et Vendit. Lib. iii. tit. xxiii. § 1, § 2. Pothier also supports this opinion, Contrat de Vente, § 48. See, also, Duranton, Vol. 16, Contrat de Vente, Liv. 3, tit. 6, § 16. Paul. Dig. de Contrah, Empt. Lib. 1, § 1. Dig. de Rerum Permutatione, Lib. xix. tit. iv. § 1.

<sup>3</sup> Code, Nap. 1599.

<sup>4</sup> Toullier Cont. de Vente, vol. 14, n. 240.

<sup>5</sup> Sirey, vol. 32, pt. 1, p. 628; Dalloz, vol. 32, pt. 1, p. 54.

the great weight of authority is against it, and Duranton, Duvergier, Delvincourt, Fremery, among others, agree, that by the Code, the rule of the Roman law is changed, and that a vendee is at once entitled to have his contract annulled, on discovery that the seller could not make him the rightful owner.<sup>1</sup>

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<sup>1</sup> Duranton, Cours de Droit Français, Vol. 10, § 437, p. 457; Ibid. Vol. 16; Du Contrat de Vente, § 176, 177; Duvergier, Droit Civil Français, Vol. 1; De la Vente, § 17; Delvincourt, Cours de Code Civil, Vol. 3, Liv. iv. ch. 2, p. 68. Fremery, Etudes du Droit Commercial, p. 5. He thus admirably expresses himself: "Les fragmens qui sont conservés au Digeste prouvent, jusqu'à l'évidence, que la coutume avait consacré à Rome une formule habituelle pour les contrats de vente, sauf les clauses spéciales que, suivant l'occurrence, il fallait y ajouter. Dans cette formule, c'était le vendeur qui parlait, *legem dicebat*. La coutume était d'employer, dans cette formule, pour exprimer l'engagement que le vendeur entendait contracter, ces mots: *præstare emptori rem habere licere*: ces termes, dans leur sens rigoureux, sont moins étendus que l'expression *rem dare*. Les jurisconsultes ont décidé, d'après ces données, que toute clause ambiguë devait s'interpréter contre le vendeur, qui est en faute de ne s'être pas expliqué plus clairement; ils ont décidé, en outre, que son engagement n'emportait pas l'obligation de transférer la propriété.

"Justinien a transporté ces décisions dans son Digeste et les a érigées en loi; en sorte que, tirant leur force du caractère de loi, et non des circonstances particulières du fait d'après lesquelles les jurisconsultes avaient raisonné, elles s'appliquent à tout contrat de vente par la nature que la loi lui reconnaît. Si donc la vieille formule est abandonnée, si le vendeur se sert des mots *rem dare*, et non plus de ceux-ci, *rem habere licere*, comment expliquerait-on une loi qui déclare que le vendeur ne s'oblige pas à transférer la propriété? Et si, n'employant ni l'une ni l'autre locution, il se borne à dire: *je vends*, et s'en réfère à la coutume pour expliquer le sens qu'elle a fini par attribuer à ce mot; que fera-t-on quand il sera constant que tous ceux qui emploient ce terme, y attachent l'idée que le vendeur s'oblige à transférer la propriété?

"C'est précisément ce qui est advenu. Depuis bien des siècles, on enseigne dans nos écoles qu'il est de la nature du contrat de vente que le vendeur ne s'oblige point à rendre l'acheteur propriétaire: *ipse dixit!* Et cependant, depuis bien des siècles aussi, le mot: *je vends*, n'est plus paraphrasé dans la formule romaine, qui en déterminait le sens; quiconque le prononce ou l'entend, comprend sans hésiter que celui qui vend, doit rendre l'acheteur propriétaire; et chacun se demande comment il se fait que, par la nature du

§ 834. Secondly. When an examination of goods is, from their nature or situation at the time of the sale, impracticable, a warranty will be implied, that they are merchantable. Thus, if goods be at sea, or not arrived; or if they fill the hold of a ship, so that nothing but the surface can be seen; or if they be in bales, so that an examination of the centre cannot be made without tearing each bale to pieces; the seller will be understood to warrant them to be merchantable, and of the quality demanded and expected by the buyer.<sup>1</sup> But if the whole of the goods be open to the

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contrat de vente, le vendeur ne soit point engagé à faire passer la propriété à l'acheteur.

“Toutefois, depuis que le Code Civil a paru, et a déclaré, article 1599 : ‘*la vente de la chose d'autrui est nulle*,’ plusieurs personnes ont pensé que, si la vente de la chose d'autrui est nulle, c'est donc que les deux parties doivent avoir l'intention commune, l'une de conférer, l'autre d'acquérir la propriété de la chose vendue ; en sorte que la nature du contrat de vente, qui, en droit romain, n'imposait pas au vendeur l'obligation de rendre l'acheteur propriétaire, en droit Français, au contraire, comprendrait aujourd'hui cette obligation.” See, also, even before the Code, the similar opinion of Denizart, Vol. 9, vo. Garantie ; and of Argou, Inst. au Droit Français, Liv. 3, ch. 23, against that of Pothier, Contrat de Vente, § 98. See, also, for the Scottish Law, Erskine's Inst. Book iii. tit. 3, § 4.

<sup>1</sup> In Gardiner *v.* Gray, 4 Camp. 144, Lord Ellenborough said, that a warranty that the goods sold are merchantable, would be implied where “there was no opportunity to examine.” So, also, these words are cited and affirmed in Wright *v.* Hart, 18 Wend. R. 456. So, also, in Gallagher *v.* Waring, 9 Wend. R. 20 ; Osgood *v.* Lewis, 2 Har. & Gill, R. 495. In Hyatt *v.* Boyle, 5 Gill, & Johns. R. 110, the warranty of merchantable is limited to cases where the examination is “impracticable ;” and the mere fact of labor or inconvenience is not considered as equivalent to impracticability. This limitation is recognized in Hart *v.* Wright, 17 Wend. R. 267. In New York, however, the old doctrine of the common law of *caveat emptor* is now established. See Wright *v.* Hart, 18 Wend. R. 456 ; 2 Kent, Comm. Lect. 39, p. 479, note (b) ; Waring *v.* Mason, 18 Wend. R. 425 ; Salisbury *v.* Stainer, 19 Wend. R. 159. But see Howard *v.* Hoey, 23 Wend. R. 350. The doctrine of the common law, however, is denied in the late English case of Jones *v.* Bright, 5 Bing. R. 535 ; 1 Dan. & Lloyd, R. 304 ; and the general bearing of all the late cases is in favor of the doctrine as stated in the text. See Hastings *v.* Lovering, 2 Pick. R. 219, 220, and note ; Winsor *v.* Lombard, 18 Pick. R. 60 ; Brown *v.*

examination of the buyer, and the seller make no warranty, he is not understood to assume a responsibility for any defect, whether it be latent or patent; because the law will not protect a man from the consequences of his own neglect and carelessness in making a bargain, when the other party has been guilty of no fraud or improper connivance.<sup>1</sup> Where a man can examine the goods, if he chooses, and he neglects so to do, he must suffer the consequences of his carelessness. But if he cannot examine them, he takes them upon trust, that they are what he intended to buy, and what the buyer, by assenting to his order, or to his self-deception, virtually affirms them to be; and the party occasioning the injury ought to bear the loss.

§ 834 a. In such cases, if from the mode of packing, a portion of an article only can be seen, and it be shown by the vendor, the sale will often be treated as a sale by sample. And this seems to be the most reasonable way of construing such a contract. Thus, as packed cotton can only be examined on the exterior, and by plucking portions of it as samples of the interior, it has been treated as a sale by sample.<sup>2</sup> This leads us to the consideration of the warranty implied in a sale by sample.

§ 835. Thirdly. Where goods are sold by sample, a warranty is implied, that the bulk corresponds to the sample, in nature and quality.<sup>3</sup> It amounts to an affirmation, that all of

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Edgington, 2 Man. & Grang. R. 279; Chanter *v.* Hopkins, 4 Mees. & Welsb. R. 399; Salisbury *v.* Stainer, 19 Wend. R. 159; Holcombe *v.* Hewson, 2 Camp. R. 391; Oneida Manuf. Co. *v.* Lawrence, 4 Cowen, R. 444. But see Mixer *v.* Coburn, 11 Metcalf, R. 561, where the maxim of "*caveat emptor*" is fully enforced; and see, also, Lamb *v.* Crafts, 12 Metcalf, R. 353.

<sup>1</sup> Stevens *v.* Smith, 21 Verm. R. 90; Bluett *v.* Osborne, 1 Stark. N. P. C. 384.

<sup>2</sup> Oneida Manuf. Co. *v.* Lawrence, 4 Cowen, R. 444; Rose *v.* Beatie, 2 Nott & McCord, R. 538.

<sup>3</sup> See Brower *v.* Lewis, 19 Barbour, R. 574.

the goods are similar to those exhibited; and if they be not, the vendee may rescind the contract.<sup>1</sup> But the mere exhibiting of a sample at the time of the sale will not, of itself, constitute a sale by sample, so as to subject the seller to liability on his implied warranty; because it may be exhibited merely to enable the buyer to form a judgment on its probable quality.<sup>2</sup> Yet if the contract be connected by the circumstances of the sale with the sample, and refer to it, and it be shown as the inducement to the bargain, the sale will be a sale by sample.<sup>3</sup> So, also, where a lot of goods in bales is sold and no one is offered as a sample, and the purchaser having the power to examine all the bales only examines one, he cannot claim that the sale was by sample.<sup>4</sup>

§ 836. Fourthly. Upon an executory contract of sale, where goods are to be manufactured, or to be procured for a particular use or purpose, a warranty will be implied that they are reasonably fit for such purpose or use, as far as goods of such a kind can be.<sup>5</sup> But where the purchaser lives at a place distant

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<sup>1</sup> *Lorymer v. Smith*, 1 B. & C. R. 1; s. c. 2 D. & R. R. 23; *The Oneida Manuf. Co. v. Lawrence*, 4 Cowen, R. 440; *Hibbert v. Shee*, 1 Camp. R. 113; *Parkinson v. Lee*, 2 East, R. 314; *Beebee v. Robert*, 12 Wend. R. 413; *Boorman v. Jenkins*, 12 Wend. R. 566; *Gallagher v. Waring*, 9 Wend. R. 20; *Williams v. Spafford*, 8 Pick. R. 250; *Bradford v. Manly*, 13 Mass. R. 139; *Magee v. Billingsley*, 3 Alab. R. 679; *Beirne v. Dord*, 2 Sandf. S. C. R. 89.

<sup>2</sup> See *Beirne v. Dord*, 2 Sandf. R. 89; 1 Selden, R. 95; *Hargous v. Stone*, 1 Selden, R. 73.

<sup>3</sup> *Gardiner v. Gray*, 4 Camp. R. 144; *Brown on Sales*, 472; *Long on Sales*, 192, (Rand's ed.); *Meyer v. Everth*, 4 Camp. R. 22.

<sup>4</sup> *Salisbury v. Stainer*, 19 Wend. R. 159.

<sup>5</sup> *Jones v. Bright*, 5 Bing. R. 533; s. c. 3 *Moore & Payne*, R. 155; *Beals v. Olmstead*, 24 Verm. R. 114; *Brenton v. Davis*, 8 Blackf. R. 317; *Gower v. Von Dedalzen*, 4 Scott, R. 460; 3 *Bing. N. C. R.* 717; *Gray v. Cox*, 1 *Car. & Payne*, R. 186; 4 *Barn. & Cresw. R.* 115; *Bluett v. Osborne*, 1 *Stark. R.* 381; *Gallagher v. Waring*, 9 Wend. R. 20; *Shepherd v. Pybus*, 4 Scott, n. s. 434; *Smith v. Marable*, 11 Mees. & Welsb. R. 5; *Freeman v. Clute*, 3 *Barbour, Sup. Ct. R.* 425; Post, § 850 a, note. In *Howard v. Hoey*, 23 Wend. R. 350, the court distinguishes between executed and executory contracts of

from the manufacturer, a contract for a manufactured article is complied with, if an article of a suitable quality be delivered to the carrier for the purpose of being conveyed to the purchaser; and if it be deteriorated on the passage, only to an extent to which it is necessarily subject in the transit, the purchaser is bound to accept the article.<sup>1</sup> This warranty is only implied, where the subject of the sale is either not "*in esse*," or is to be furnished to order by the seller, and where the seller has no opportunity to examine the article bought. Thus, where copper sheathing which the sellers were to manufacture, was ordered for the purpose of sheathing a vessel, and it proved worthless; it was held, that a warranty, that the copper was fit for sheathing was implied.<sup>2</sup> So, also, where the same article, after it was manufactured, was bought of a merchant, who was not the manufacturer, but who undertook to supply it, the same warranty was implied.<sup>3</sup> There is no distinction be-

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sale in respect to the implied warranty. And Bronson, Ch. J., says, "Where a contract is executory, or, in other words, to deliver an article not defined at the time, on a future day, whether the vendor have an article of the kind on hand, or it is afterwards to be procured or manufactured, the promisee cannot be compelled to put up satisfied with an inferior commodity. The contract always carries an obligation that it shall be at least merchantable —at least of medium quality or goodness. If it come short of this, it may be returned, after the vendee has had a reasonable time to inspect it." See, also, *Moses v. Mead*, 1 Denio, R. 378, where this case is recognized.

<sup>1</sup> *Bull v. Robison*, 28 Eng. Law & Eq. R. 586.

<sup>2</sup> *Jones v. Bright*, 5 Bing. R. 535; 1 Dan. & Lloyd, R. 304. See *Brown v. Edgington*, 2 M. & Gr. R. 279; *Dickson v. Jordan*, 11 Iredell, R. 166; *Burns v. Fletcher*, 2 Carter, (Ind.) R. 372.

<sup>3</sup> *Gray v. Cox*, 4 Barn. & Cres. R. 108. In this case, the declaration alleged, that the defendants undertook to supply copper sheathing of a sound, substantial, and serviceable quality. Lord Tenterden first held, that as the defendant sold the copper to be applied to a specific use, there was an implied warranty, that the copper was fit for such use. The question was, however, twice argued, upon motion for a new trial, and the court ultimately decided it on a question of pleading, that no allegation being set forth that the plaintiff knew of the use for which the copper was intended, and

tween the merchant, who undertakes to procure goods in compliance with an order, and the manufacturer, who is to make them; for the manufacturer has it within his power to render the article fit for the stated purpose by the mode of manufacture, and the seller who undertakes to procure the articles has it in his power to procure those which are fit and proper; and, therefore, there is the same trust reposed in both, which they must take care not to violate. But no such rule applies to the case of a merchant, who has bought the goods to sell again, if they be open to examination, and be not supplied for a particular purpose.<sup>1</sup> For, where goods are not susceptible of examination, the buyer has a claim upon the seller, in consideration of the necessary trust reposed in him, which does not arise where the goods can be seen.

§ 836 a. But where an article of a certain and definite nature is to be manufactured to order, the seller, of course, can in no sense be considered as warranting it to be appropriate to the use to which the buyer intends to apply it; but only to be as fit as any similar article, complying with the order, can reasonably be expected to be. That is, the seller does not warrant the judgment of the buyer, in ordering such an article, for such a use, but only the fitness of the article, as far as its quality is concerned. Thus, where an article was ordered of the manufacturer, under the designation of "Chanter's smoke-consuming furnace," to be used in the defendant's brewery, and it was found not to be adapted to such a use, although it operated in its usual manner; there being no fraud, it was held, that the seller could not be understood to warrant, that the furnace was adapted to the use for which it was intended;

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thereby warranted it to be fit for such use, the plaintiff was not entitled to recover.

<sup>1</sup> *Bluett v. Osborne*, 1 Stark. N. P. C. 384. In this case a bowsprit was sold, which was examined and was apparently sound, but which proved worthless and rotten. As there was no fraud, the seller was properly held not to be liable.

inasmuch as it was a specific and definite article, and as good for the purpose as any answering the description in the order.<sup>1</sup> But if the skill and judgment of the maker be relied upon, and he be requested to make a machine adapted to a particular purpose, the manufacturer would be bound to supply an article reasonably fit to accomplish such purpose.<sup>2</sup> Thus, where the plaintiff was the patentee and manufacturer of a patent machine for printing two colors, and the defendant having seen one of the machines on the plaintiff's premises, ordered one, the plaintiff undertaking by a written memorandum to make "a two-color printing machine on my patent principle," and in an action for the price, the defendant excused himself from liability, on the ground that the machine had been found useless for printing in two colors,—it was held, that if the machine described were a known and ascertained article, ordered by the defendant, he was liable, whether it answered his purpose or not; but that if it were not a known and ascertained article, and the defendant had merely ordered, and the plaintiff had agreed to supply, a machine for printing two colors, the defendant was not liable, unless the instrument was reasonably fit for such purpose.<sup>3</sup>

§ 837. Fifthly, a warranty will be implied against all *latent* defects, in two cases: 1st. When the seller knew that the buyer did not rely on his own judgment, but on that of the seller, who knew at the time, or might have known the existence of the defects. 2dly. Where, from the situation of the parties, (as in the case of a manufacturer, or producer,) the seller might have provided against the existence of defects; or

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<sup>1</sup> Chanter *v.* Hopkins, 4 Mees. & W. R. 399.

<sup>2</sup> Jones *v.* Bright, 5 Bing. R. 535; Brown *v.* Edgington, 2 Man. & Grang. R. 279; Carnochan *v.* Gould, 1 Bailey, R. 179; Brenton *v.* Davis, 8 Blackf. R. 317. The same rule applies to a mechanic or artisan who undertakes to do particular work. See ante, § 737, § 740 c.

<sup>3</sup> Ollivant *v.* Bayley, 5 Adolph. & Ell. N. C. R. 289. See also Shepherd *v.* Pybus, 4 Scott (N. S.), 444.

where a warranty may be presumed from the very nature of the transaction.<sup>1</sup> The ground of this warranty is the implied trust and confidence reposed in the seller by the buyer, with the buyer's tacit consent; and, therefore, whenever this reason fails, the warranty fails. Thus, if a sale of an article be made "with all faults," it amounts to a notification to the buyer, that the seller will not subject himself to any liability, or accept any trust or confidence; and he, therefore, is not liable for latent defects,<sup>2</sup> unless he fraudulently conceal them, or knowingly suffer the buyer to delude himself; in which case, the fraud would render him responsible.<sup>3</sup> "With all

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<sup>1</sup> Jones *v.* Bright, 5 Bing. R. 535; 1 Dan. & Ll. R. 304; Budd *v.* Fairmaner, 8 Bing. R. 52; 1 Moore & Scott, R. 81; Gallagher *v.* Waring, 9 Wend. R. 20; Martin *v.* Morgan, 3 Moore, R. 635.

<sup>2</sup> Baglehole *v.* Walters, 3 Camp. R. 154; Bywater *v.* Richardson, 3 Nev. & Man. R. 752; 1 Ad. & Ell. R. 508. See Taylor *v.* Bullen, 1 Eng. Law & Eq. R. 472.

<sup>3</sup> Schneider *v.* Heath, 3 Camp. R. 506; Freeman *v.* Baker, 2 Nev. & Man. R. 450; Polhill *v.* Walters, 3 Barn. & Adol. R. 114; Fletcher *v.* Bowsher, 2 Stark. N. P. R. 562. In Doggett *v.* Emerson, 3 Story, R. 732, Mr. Justice Story says: "It appears to me, that it is high time, that the principles of Courts of Equity upon the subject of sales and purchases should be better understood, and more rigidly enforced in the community. It is equally promotive of sound morals, fair dealing, and public justice and policy, that every vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. He should, literally, in his representation, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable; and it is usually immaterial, whether the representation be wilfully and designedly false, or ignorantly or negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters, or proclaims, or knowingly impresses upon the vendee, as a lure or decisive motive for the bargain. And I cannot but believe, if this doctrine of law had been steadfastly kept in view, and fairly upheld by public opinion, the various speculations, which have been so sad a reproach to our country, would have been greatly averted, if not entirely suppressed, by its salutary operation."

faults" must mean, however, all faults, which an article may have, consistently with its being the thing described.<sup>1</sup>

§ 838. Under this head, also, arises the implied warranty in the sale of provisions, that they are sound and wholesome, or in other words, that they are fit to be eaten; on the ground that it is not only salutary, but necessary, to the preservation of health and life.<sup>2</sup> But this warranty is restricted to sales of provisions "for domestic use," and for immediate consumption; and does not apply to provisions which are sold as merchandise, and are packed, inspected, and prepared for exportation.<sup>3</sup> In the latter case, the warranties which the law implies are only those which arise in the sales of other articles of merchandise. So, also, it has been said, that this warranty applies only to provisions sold by general dealers, who are in the habit and trade of selling provisions, such as victuallers, taverners, butchers, and the like, and not to others unless in cases of fraud, or when the seller knows the articles not to be good.<sup>4</sup>

§ 839. There is a class of cases which is usually treated as coming under the head of Implied Warranty; but to which the doctrine of warranty seems to be wholly inapplicable. These cases are where the article actually purchased is different in species from that which was contracted for; as where an article was bought as "waste silk," which could not be sold under that denomination;<sup>5</sup> and where something was bought as "scarlet cuttings;" which was not in reality, "scar-

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<sup>1</sup> *Shepherd v. Kain*, 5 Barn. & Ald. R. 240.

<sup>2</sup> *3 Black. Comm.* 165; *Van Bracklin v. Fonda*, 12 Johns. R. 468; *Osgood v. Lewis*, 2 Harr. & Gill, R. 495; *Winsor v. Lombard*, 18 Pick. R. 57; 2 *Kent, Comm.* 479.

<sup>3</sup> *Winsor v. Lombard*, 18 Pick. R. 57; *Emerson v. Brigham*, 10 Mass. R. 197; *Moses v. Mead*, 1 Denio, R. 378. See *Burnby v. Bollett*, 16 M. & W. R. 644; *Humphreys v. Comline*, 8 Blackf. R. 508.

<sup>4</sup> *Burnby v. Bollett*, 16 Mees. and Welsb. R. 644.

<sup>5</sup> *Gardiner v. Gray*, 4 Camp. R. 144.

let cuttings;"<sup>1</sup> or where a stone was sold for a bezoar stone, when, in fact, it was not such a stone;<sup>2</sup> or where a substance was represented in a bill of parcels as "indigo," which was a compound fraudulently made to resemble indigo.<sup>3</sup> These, however, are evidently either pure matters of mistake, in respect to the subject-matter of the contract, or of fraud; and, in either case, the contract is at an end.<sup>4</sup> The cases of a breach of implied warranty, are cases, where the article is of the proper kind and description, but of an inferior quality. A vendor only warrants impliedly the epithet, or adjective, and not the substantive. But whether they be considered as cases of fraud or mistake, or as cases of implied warranty, the vendor is equally bound to furnish goods which correspond in species to his representation, and bear the name of the article supposed to be bought and sold.<sup>5</sup>

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<sup>1</sup> *Bridge v. Waine*, 1 Stark. N. P. C. 504. See, also, *Shepherd v. Kain*, 5 Barn. & Ald. R. 240.

<sup>2</sup> *Chandelor v. Lopus*, Cro. Jac. R. 4. It seems to us, that Anderson, J., was the only judge who appreciated the real point of this case. He held, that the deceit in selling the stone as a bezoar, when it was not, was a sufficient cause of action. This case went off, however, on a question of pleading. See Dyer, R. 75, note, and *Morrill v. Wallace*, 9 N. Hamp. R. 113, where Parker, J., says: "This case, as stated in Coke, can hardly be regarded as authority in the present day. A report of the opinion of Mr. Justice Popham, in that case, (Dyer, R. 75, note,) is more in accordance with recent decisions." See, also, *Borrekins v. Bevan*, 3 Rawle, R. 23.

<sup>3</sup> *Henshaw v. Robins*, 9 Metcalf, R. 83; *Nichol v. Godts*, 26 Eng. Law & Eq. R. 527.

<sup>4</sup> See ante, Mistake, § 407 to § 425; *Henderson v. Sevey*, 2 Greenl. R. 139.

<sup>5</sup> *Henshaw v. Robins*, 9 Metcalf, R. 83; *Borrekins v. Bevan*, 3 Rawle, R. 23. In this case, the court, after saying that *Chandelor v. Lopus*, Cro. Jac. R. 4, as well as the cases of *Seixas v. Wood*, 2 Caines, R. 48, and *Swett v. Colgate*, 20 Johns. R. 196, in which the contrary doctrine was held, must be abandoned, goes on to say, that "In all sales there is an implied warranty that the article corresponds in species with the commodity sold, unless there are some facts and circumstances existing in the case, of which the jury, under the direction of the court, are to judge, which clearly show that the purchaser took upon himself the risk of determining not only the quality of the goods, but the kind he purchased, or where he may waive his right."

## CHAPTER XXI.

## FRAUDULENT MISREPRESENTATION OR CONCEALMENT.

§ 840. FRAUD vitiates every contract, and may consist either in misrepresentation, or in concealment.<sup>1</sup>

§ 841. Every misrepresentation, whether fraudulent or not, which actually deceives the vendee, vitiates a contract of sale, if it be with regard to any thing constituting a material inducement thereto.<sup>2</sup> A mere false expression of opinion or judgment, with regard to the nature and quality of the article sold, or a false assertion of its value, will not constitute such a misrepresentation as to avoid a contract;<sup>3</sup> unless, on the one hand, special confidence be known to the vendor to be placed in his opinion; and, on the other hand, the buyer be without other means of information, or be induced by such affirmation to forbear making inquiry.<sup>4</sup> The cases where false assertions of

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<sup>1</sup> See upon this subject, ante, vol. 1, p. 632.

See ante, § 506 to § 516.

<sup>2</sup> *Trower v. Newcome*, 3 Meriv. R. 704; 2 Kent, Comm. Lect. 39, p. 484; *Story*, Eq. Jurisp. 190, 192, 195; *Pearson v. Morgan*, 2 Bro. Ch. R. 389; *Joice v. Taylor*, 6 G. & J. R. 54; *Ferguson v. Carrington*, 9 Barn. & Cres. R. 59; *Laidlaw v. Organ*, 2 Wheat. 178; *James v. Morgan*, 1 Lev. R. 111; *Thornborow v. Whitacre*, 2 Lord Raym. R. 1104.

<sup>3</sup> *Hill v. Gray*, 1 Stark. R. 434. See *Story*, Eq. Jurisp. § 191, &c., for a full and learned discussion of the whole of this subject. *Vernon v. Keys*, 12 East, R. 637; 2 Kent, Comm. Lect. 39, p. 482, 483; *Turner v. Harvey, Jacobs*, R. 178; *Bramley v. Alt*, 3 Ves. R. 624; *Bexwell v. Christie, Cowp.* R. 395. See ante, § 516 to § 522.

opinion are considered sufficient to constitute a fraud are, however, peculiar in their circumstances, and it behooves the buyer to be specially careful in trusting to them. Where matters of fact are misrepresented by the seller, he is guilty either of fraud or mistake, and the buyer has his remedy against him in either case.<sup>1</sup>

§ 842. So, also, every concealment of defects which is made by artifice, and for the purpose of deceiving the buyer, vitiates the sale. But the vendor is under no obligation to give all of the information that he himself possesses in regard to the article sold. The concealment, which will vitiate a contract, must be in respect of some material fact, which one party, under the circumstances, is bound in conscience and legal duty to disclose to the other. For the general rule of the common law is *caveat emptor*, and unless, as we have seen, there be a warranty, or a fraudulent misrepresentation or concealment, the vendee buys at his own risk.<sup>2</sup> But if there be any trust or confidence reposed in the seller by the buyer, which the concealment would violate, the sale is fraudulent.

§ 843. In regard to extrinsic circumstances, forming no part of the sale, but connected therewith, and forming an inducement thereto, or enhancing the value of the thing sold, there is no obligation, on the part of the seller or buyer, to disclose his knowledge of them. Thus, a vendee is not bound to disclose the fact that the land, which he contracts to buy, contains a mine, although the vendor be ignorant of the fact; and although it would greatly enhance the value of the land.<sup>3</sup> So, also, he is not bound to disclose the rise of the market; or any

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<sup>1</sup> Ante, § 506.

<sup>2</sup> Laidlaw *v.* Organ, 2 Wheat. R. 178. See Bench *v.* Sheldon, 14 Barb. R. 66; Pearce *v.* Blackwell, 12 Ired. R. 49; Ferebee *v.* Gordon, 13 Ired. R. 350; Wood *v.* Ashe, 3 Strob. R. 64; Kintzing *v.* McElrath, 5 Barr, R. 467.

<sup>3</sup> Fox *v.* Mackreth, 2 Br. Ch. R. 420; Tarner *v.* Harvey, Jacobs, R. 178; Story, Eq. Jurisp. § 205, 207.

other knowledge, which he may have from private sources, and unknown to the seller. But if a vendor should sell an estate, and conceal the fact that there were incumbrances upon it, of which the buyer was ignorant,—or that he had no title; or should sell a house which he knew to be burned down; the sale would be fraudulent, and would be set aside in equity, upon the ground that the very purchase implied a trust or confidence on the part of the vendee, that no such defect existed; and silence would, on such a point, be equivalent to an assertion that he had a good title, or that the house existed, or that there were no incumbrances.<sup>1</sup>

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<sup>1</sup>. Story, Eq. Jurisp. § 208, 209; Arnot v. Biscoe, 1 Ves. R. 95, 96; Pilling v. Armitage, 12 Ves. R. 78; Pothier, de Vente, n. 240.

## CHAPTER XXII.

## REMEDY FOR A BREACH OF THE CONTRACT OF SALE.

§ 844. If, after the goods have been delivered, and the time of payment has arrived, the vendee refuse or neglect to pay for them, the vendor may have an action for goods sold and delivered; and may recover either the price agreed upon, or the reasonable worth of the articles sold, if no price be agreed upon.<sup>1</sup> But if the goods delivered do not correspond to the agreement, the vendor can only recover the actual worth of the article, although a price be agreed upon, or although they be retained by the vendee.<sup>2</sup>

§ 844 a. Either vendor or vendee is entitled to rescind a contract of sale where the other party has been guilty of fraud or false representations,<sup>3</sup> or has entirely failed to fulfil his part of the contract;—as if the article sold prove to be entirely different in nature from that which was contracted

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<sup>1</sup> *Hoadly v. M'Laine*, 10 Bing. R. 512; 4 M. & Scott, R. 340; *Bluett v. Osborne*, 1 Stark. R. 384; *Clunnes v. Pezzy*, 1 Camp. R. 8; *Basten v. Butter*, 7 East, R. 483.

<sup>2</sup> *Street v. Blay*, 2 Barn. & Adolph. R. 456.

<sup>3</sup> *Hitchcock v. Covell*, 23 Wend. R. 611; *Hoffman v. Noble*, 6 Metcalf, R. 68; *Holbrook v. Burt*, 22 Pick. R. 546; *Harrington v. Wells*, 12 Verm. R. 505; *Thayer v. Turner*, 8 Metcalf, R. 552; *Thurston v. Blanchard*, 22 Pick. R. 18; ante, § 509; *Perley v. Balch*, 23 Pick. R. 283.

for,<sup>1</sup> — or if there be a total defect of title,<sup>2</sup> or an unreasonable delay in the performance of the contract.<sup>3</sup> But mere inadequacy of price,<sup>4</sup> or a failure of payment where credit has been given,<sup>5</sup> or a breach of warranty,<sup>6</sup> would not entitle the other to rescind. Where either party would rescind a contract, he must return or offer to return to the other all the subject-matter of sale, and must, in as far as he is able, restore him to the position in which he was before he made the contract.<sup>7</sup> An offer to return is not, however, necessary where the goods are utterly worthless.<sup>8</sup>

§ 844 b. The vendor may bring an action of assumpsit against the vendee while the contract remains unrescinded, but no longer.<sup>9</sup> But if he wishes to bring an action of trover or replevin for the article sold, he must first rescind the contract.<sup>10</sup> And the fact of fraud by the other party, although it entitles him to rescind, does not enable him to sustain trover and replevin, until the rescission has actually been made.<sup>11</sup>

§ 844 c. The rule, that goods obtained by fraud or false

<sup>1</sup> *Stinson v. Walker*, 21 Maine, R. 211; *Thornton v. Kempster*, 5 Taunt. R. 786; *Farrer v. Nightingale*, 2 Esp. 640; ante, § 836, § 839.

<sup>2</sup> See post, § 850, § 976; 2 Kent, Comm. Lect. xxxix. p. 470, 471, 475, and cases cited; *Roffey v. Shallcross*, 4 Madd. Ch. R. 127.

<sup>3</sup> *Benson v. Lamb*, 9 Beav. R. 502.

<sup>4</sup> *Harrington v. Wells*, 12 Verm. R. 505; ante, § 502, § 115.

<sup>5</sup> *Martindale v. Smith*, 1 Adolph. & Ell. (N. S.) 395; post, § 845.

<sup>6</sup> *Voorhees v. Earl*, 2 Hill, R. 288; *Thornton v. Wynn*, 12 Wheat. R. 192; post, § 849.

<sup>7</sup> *Voorhees v. Earl*, 2 Hill, R. 288. See post, § 977. *Masson v. Bovet*, 1 Denio, R. 69; *Ferguson v. Oliver*, 8 Smedes & Marsh. R. 332; *Christy v. Cummins*, 3 McLean, R. 386.

<sup>8</sup> *Christy v. Cummins*, 3 McLean, R. 386.

<sup>9</sup> *Allen v. Ford*, 19 Pick. R. 217; *Thayer v. Turner*, 8 Metcalf, R. 550.

<sup>10</sup> *Ibid.* *Ferguson v. Carrington*, 9 Barn. & Cres. R. 59; *Strutt v. Smith*, 1 Cromp., Mees., & Rose. R. 315.

<sup>11</sup> *Thayer v. Turner*, 8 Metcalf, R. 550; *Prentiss v. Russ*, 16 Maine R. 30; *Stinson v. Walker*, 21 Maine R. 211; *Strutt v. Smith*, 1 Cromp., Mees., & Rose. 315.

representations, may be reclaimed by the vendor, does not proceed on the ground, that the property in the goods does not pass by the sale, but that the dishonest purchaser shall not hold it against the deceived vendor. It is, therefore, at the option of the vendor, either to affirm or to rescind the sale. But, if he elect to rescind, he must do so within reasonable time;<sup>1</sup> and if he do any thing to affirm the sale, after a full knowledge of the facts, and especially, if he suffer a considerable time to elapse, or if others be induced by his dilatoriness to act, his right to disaffirm the sale and reclaim the goods will be gone.<sup>2</sup>

§ 844 d. Again, “this right of reclaiming can be enforced only whilst the goods are in the hands, *first*, of the fraudulent purchaser; or, *secondly*, of some agent, trustee, or other person holding for the use and benefit of the purchaser; or, *thirdly*, of some one who has taken them of the purchaser, with knowledge of the fraud by which they were obtained, or with notice sufficient to put him on reasonable inquiry, including, under this head, a mere volunteer, who has obtained the goods without paying any valuable consideration. It follows, that a purchaser for a valuable consideration, without notice, takes a title from the vendee, which is not defeasible, and will therefore hold the goods.”<sup>3</sup>

§ 844 e. But where payment and delivery are concurrent acts, if the vendee refuse to pay, according to the terms of the contract, when the offer of the goods is made, the property does not vest in him, and he has no right to retain them, and, therefore, the vendor may bring an action of replevin against

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<sup>1</sup> *Towers v. Barrett*, 1 T. R. 136; *Hynde v. Whitehouse*, 7 East, R. 571; *Brinley v. Tibbets*, 7 Greenl. R. 70; *Barnett v. Stanton*, 2 Alab. R. 187; *Johnson v. McLane*, 7 Blackf. R. 501.

<sup>2</sup> Per Ch. Justice Shaw, in *Hoffman v. Noble*, 6 Metcalf, R. 74. See, also, cases above cited; post, § 851 a. See *Kellogg v. Denslow*, 14 Conn. R. 411.

<sup>3</sup> *Ibid.*

him. Thus, where upon a sale of merchandise for cash to be paid for on delivery, the vendee offered the vendor's servant a note of the vendor's, which had become payable, for nearly the amount, and cash for the residue, and upon the vendor's declining to receive such payment, the vendee refused to surrender the goods, it was held that no title passed, and that the vendor could maintain replevin.<sup>1</sup> And where goods are sold to be paid for by a bill or note payable at a future day, and such bill or note is not delivered according to the terms of the sale, the vendor may sue immediately for a breach of the special agreement, and recover as damages the value of the goods, allowing a rebate of interest during the stipulated credit.<sup>2</sup> But assumpsit on the common count will not lie, until the credit has expired.<sup>3</sup> Yet, where the note is to be given at six months, and the goods are delivered and no demand is made for two months after the sale, the condition will be deemed to be waived.<sup>4</sup>

§ 845. If the vendee refuse to take the goods at the time and place agreed upon for delivery, the vendor, if he be ready to deliver them, may recover the price in an action for goods bargained and sold; or, unless the vendee object specially, he may sell the goods and recover the difference between the sum they actually bring and the price agreed upon; or, in the absence of any agreement as to price, he may recover the difference between the price they bring, and their worth at the time of the completion of the contract.<sup>5</sup> But where a special time

<sup>1</sup> *Leven v. Smith*, 1 Denio, R. 571; *Powell v. Bradlee*, 9 Gill & Johns. R. 220. See, also, *Manwell v. Briggs*, 17 Verm. R. 176; *Lucy v. Bundy*, 9 N. Hamp. R. 298.

<sup>2</sup> *Hanna v. Mills*, 21 Wend. R. 90. See post, § 979.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Hennequin v. Sands*, 25 Wend. R. 640.

<sup>5</sup> *Boulter v. Arnott*, 3 Tyrw. R. 267; 1 Cr. & M. R. 333; *Long on Sales*, Rand's ed. 476; *Langfort v. Tiler*, 1 Salk. R. 112; *McLean v. Dunn*, 4 Bing. R. 722; *Boorman v. Nash*, 9 B. & C. R. 145; *Gregory v. McDowell*, 8 Wend. R. 435; *Dey v. Dox*, 9 Ibid. 129; *Stewart v. Cauty*, 8 Mees. & Welsb. R.

of credit has been given, it would seem, that the vendor could not, upon the non-compliance of the vendee with the exact terms of the bargain as to payment, undertake to rescind the contract and to sell the goods, contrary to the vendee's wishes, but that he is bound to hold them and to sue the vendee on the contract.<sup>1</sup> The vendor would not, therefore, be justified in selling the goods, except upon the utter refusal of the vendee to receive them, after tender within reasonable time and under reasonable circumstances; but in such case, after notice, he would be entitled to sell, because the vendee's assent to such a proceeding would be fairly implied in the circumstances. Where the resale of the goods does not indemnify him, he may recover the difference between the contract price and the price obtained on the resale as damages;<sup>2</sup> and if he be prejudiced by any unreasonable delay on the part of the vendee to take the goods, he may also recover damages therefor.<sup>3</sup> In respect to the mode of sale, the usage of trade in similar cases governs; and if the usage be to sell by auction, or through the agency of a broker, such course should be adopted.<sup>4</sup> Where there is no usage, the seller must dispose of them in good faith, and in the mode best calculated in his opinion to produce their value. In respect to notice, the rule is, that a reasonable notice should be given; and this question will depend on the circumstances of each case. It has been held, in one case, that where the parties lived in the same town, and repeated applications for payment had been made without success, that a notice by the seller that he would resell on the ensuing day, was sufficient, no objection having been made.<sup>5</sup>

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160. But see *Bowker v. Wilmshurst*, 3 Scott, N. R. 272; 7 Man. & Grang. R. 882; *Crooks v. Moore*, 1 Sandf. Sup. Ct. R. 297.

<sup>1</sup> *Martindale v. Smith*, 1 Adolph. & Ell. (N. S.) R. 395; *Milgate v. Kebble*, 3 Scott, N. R. 358.

<sup>2</sup> *Crooks v. Moore*, 1 Sandf. (Sup. Ct.) R. 297.

<sup>3</sup> *Greaves v. Ashlin*, 3 Camp. R. 426.

<sup>4</sup> *Crooks v. Moore*, 1 Sandf. (Sup. Ct.) R. 297. See also post, § 848.

<sup>5</sup> *Ibid.*

§ 846. The vendee may maintain an action in trover, when the goods are vested in him, if the vendor refuse to deliver them upon tender of the price; and the measure of damages will be the difference between the agreed price, or the value at the time agreed upon for delivery, and their value at the time when, and at the place where, they were to have been delivered;<sup>1</sup> or, perhaps, at the time of the trial.<sup>2</sup> If the goods be already paid for, the vendee may recover in damages any additional value which the goods may have acquired, at any intermediate time between the time agreed upon for delivery and the trial of the case.<sup>3</sup> But if the goods have not been paid for, the measure of damages would be their value at the time and place where they should have been delivered.<sup>4</sup> So, also, the vendee may, under special circumstances, recover such damages for unreasonable delay as have actually been sustained.<sup>5</sup>

§ 847. Where the contract is an entirety, for a specific quantity of goods, and the vendor delivers only a part, the vendee may refuse to accept it; but if he retain the part delivered, he is liable, upon a *quantum meruit*, for their value.<sup>6</sup> Where,

<sup>1</sup> See Peterson *v.* Ayre, 24 Eng. Law & Eq. R. 382.

<sup>2</sup> Greening *v.* Wilkinson, 1 Car. & Payne, R. 625; Mertens *v.* Adcock, 4 Esp. R. 251; Gainsford *v.* Carroll, 2 Barn. & Cres. R. 624; Boorman *v.* Nash, 9 Ibid. 145.

<sup>3</sup> Clark *v.* Pinney, 7 Cow. R. 681; Sheppard *v.* Hampton, 3 Wheat. R. 200; West *v.* Wentworth, 3 Cow. R. 82; Greening *v.* Wilkinson, 1 Car. & Payne, R. 625. But in Massachusetts, the value of the goods, at the time when the delivery ought to be made, is considered as the true rule of damages. Kennedy *v.* Whitwell, 4 Pick. R. 466; Sargent *v.* Franklin Ins. Co. 8 Pick. R. 90.

<sup>4</sup> Shepherd *v.* Hampton, 3 Wheat. R. 200; Gainsford *v.* Carroll, 2 Barn. & Cres. R. 624; Boorman *v.* Nash, 9 Ibid. 145; Swift *v.* Barnes, 16 Pick. R. 194; Shaw *v.* Nudd, 8 Pick. R. 9; Douglass *v.* McAllister, 3 Cranch, R. 298; Hopkins *v.* Lee, 6 Wheat. R. 109.

<sup>5</sup> Brown on Sales, No. 818; Long on Sales, Rand's ed. 478; Marshall *v.* Campbell, 1 Yeates, R. 36, 37.

<sup>6</sup> Roberts *v.* Beatty, 2 Penn. R. 63; Oxendale *v.* Wetherell, 9 Barn. & Cres. R. 386; Mavor *v.* Pyne, 3 Bing. R. 285; 11 Moore, R. 2; Shipton *v.* Casson,

however, under a contract of warranty, the vendee retains the goods, after giving notice of their defects, the vendor can only recover the actual value of the goods; and the vendee, if he have advanced the full price, may recover the difference between it and the actual value.<sup>1</sup> If notice be not given, it will afford a strong presumption that the goods corresponded to the warranty, but such presumption may be rebutted.<sup>2</sup> Wherever an article is sold under a warranty as to its quality, or with a representation amounting to a warranty, the burden of proof, in an action to recover the price, is on the vendee, to show that it was not equal to the warranty.<sup>3</sup>

§ 848. When goods have been received, and the price paid, but they do not correspond to the contract, and are not accepted, and are returned, the vendee may recover the price paid, in an action for money had and received to his use. But if they cannot be returned without great expense, as if they be received from a distance, they may be sold on account of the vendor, and the vendee may recover the difference between the sum received from the sales and the contract price.<sup>4</sup> If the price have not been paid, the vendee is not obliged to pay it.<sup>5</sup> So, also, if the vendor refuse to receive the goods again, the vendee may upon notice sell, in which case the vendor could only recover the amount of the proceeds of the sale, after deducting a fair compensation for the services of the vendee; or he may set the articles aside, and give notice that he will not keep them, in which case he

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<sup>5</sup> Barn. & Cres. R. 378; Bragg *v.* Cole, 6 Moore, R. 114; Miner *v.* Bradley, 22 Pick. R. 457.

<sup>1</sup> 2 Stark. Ev. 1607; Caswell *v.* Coare, 1 Taunt. R. 566; Curtis *v.* Hannay, 3 Esp. C. R. 83; Cothers *v.* Keever, 4 Barr. R. 168.

<sup>2</sup> Fielder *v.* Starkin, 1 H. Bl. R. 19; Hopkins *v.* Appleby, 1 Stark. R. 477.

<sup>3</sup> Dorr *v.* Fisher, 1 Cush. R. 274.

<sup>4</sup> Woodward *v.* Thacher, 21 Verm. R. 580; Buffington *v.* Quantin, 17 Penn. R. 310.

<sup>5</sup> Street *v.* Blay, 2 B. & Ad. R. 463; Story on Agency.

would not be liable therefor, except on some special contract duly proved.<sup>1</sup> Where a sale is thus made, it is not necessary that it should be made by auction, or in any particular mode, unless such be the usage, but the goods must be sold in good faith and in the mode best calculated to produce their value; and if there be any usage as to the mode of sale, it should be followed.<sup>2</sup> In respect to notice in such cases, the rule is, that reasonable notice should be given; but what constitutes reasonable notice, must depend on the peculiar circumstances of each case.<sup>3</sup>

§ 848 *a.* In order to support an action for money had and received, the contract must have been previously rescinded *in toto*,<sup>4</sup> which may be done either by an act of the vendee, where by the terms of the contract, it is in his power to rescind it by such act; or, by the unconditional assent of the vendor to the rescinding thereof. Where the vendee is at liberty to return the goods bought, by the special terms of the contract, his offer to return will be considered as equivalent to an actual return, and sufficient to found the action for money had and received.<sup>5</sup>

§ 848 *b.* Another species of sale, is a conditional sale, where there is a contract of "sale or return," as it is called, wherein the goods pass to the purchaser with an option in him to return them within a reasonable time; and if he fails to exercise that option in a reasonable time, the sale becomes absolute, and the price of the goods may be received, in an action for goods sold and delivered.<sup>6</sup>

<sup>1</sup> *Greene v. Bateman*, 2 *Woodbury & Minot*, R. 359.

<sup>2</sup> *Crooks v. Moore*, 1 *Sandf. Sup. Ct. R.* 297.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Clark v. Baker*, 5 *Metcalf*, R. 452.

<sup>5</sup> *Towers v. Barrett*, 1 *T. R.* 136; *Thornton v. Wynn*, 12 *Wheat. R.* 192; *Coolidge v. Brigham*, 1 *Met. R.* 550; *Clark v. Baker*, 5 *Metcalf*, R. 452.

<sup>6</sup> *Moss v. Sweet*, 3 *Eng. Law & Eq. R.* 311; *Bailey v. Goldsmith, Peake*, R. 56; *Beverley v. Gas Light Co.* 6 *Ad. & Ell. R.* 829.

§ 849. But where the sale is absolute, and there is no subsequent agreement or consent of the vendor to take back the article, the vendee cannot bring the action for money had and received, but is put to his action on the agreement or warranty, unless it be proved that the vendor knew of the unsoundness or inferiority of the article, and that the vendee offered to return it within reasonable time.<sup>1</sup> On an action for a breach of warranty, therefore, the vendee is not bound either to return the goods, or to give notice that they do not comply with the warranty;<sup>2</sup> although, if such notice were not given, it might afford a strong presumption that the goods had not the defect complained of at the time of the sale.<sup>3</sup> Where no notice is given, the measure of damages will be the difference between the price given and the actual value at the time of the sale. But where notice is given, storage may be charged, and expenses of keeping after notice,<sup>4</sup> for such a period of time as would reasonably be required to sell to advantage.<sup>5</sup> Whenever the property in a specific chattel has passed to the vendee, and the price has been paid, and the article accepted and received into possession, he has no right to return it, upon breach of warranty, and revest the property in the vendor, without his consent, but must sue upon the warranty; unless there had been a condition in the contract, authorizing the re-

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<sup>1</sup> *Thornton v. Wynn*, 12 Wheat. R. 192; *Towers v. Barrett*, 1 T. R. 136; *Voorhees v. Earl*, 2 Hill, R. 288; *Kase v. John*, 10 Watts, R. 107; *West v. Cutting*, 19 Verm. (4 Washburn,) R. 536.

<sup>2</sup> *Dorr v. Fisher*, 1 Cushing, R. 274; *Waring v. Mason*, 18 Wend. R. 425; *Thompson v. Botts*, 8 Missouri R. 710; *Carter v. Stennet*, 10 B. Monroe, R. 250.

<sup>3</sup> *Fielder v. Starkin*, 1 H. Bl. R. 17; *Poulton v. Lattimore*, 9 B. & C. R. 259; 4 Man. & Ry. R. 208; *Kellogg v. Denslow*, 14 Conn. R. 411.

<sup>4</sup> *Caswell v. Coare*, 1 Taunt. R. 566; s. c. 2 Camp. R. 82; *Germaine v. Burton*, 3 Stark. R. 32; *Chesterman v. Lamb*, 4 Nev. & Man. R. 195; 2 Ad. & Ell. R. 129; *Armstrong v. Percy*, 5 Wend. R. 539; *Egleston v. Macaulay*, 1 McCord, R. 379; *Buchanan v. Parnshaw*, 2 T. R. 745.

<sup>5</sup> *Ellis v. Chinnock*, 7 C. & P. R. 169; *McKenzie v. Hancock*, R. & M. R. 436.

turn; or unless the vendor have actually received back the chattels; or have been guilty of a fraud.<sup>1</sup> The goods may, however, of course, be returned at any time, by the agreement of both parties.<sup>2</sup> But if the goods have not been accepted, and the contract be not completed, the vendee may return them within reasonable time, and may retain them sufficiently long to make a fair trial of them.<sup>3</sup>

§ 849 a. In an executory contract of sale to supply an article for a particular use, if the article be not fit for such use, the buyer is entitled to indemnity for the loss which the non-performance of the contract has occasioned him, and for the immediate and direct gain of which it has deprived him; but it does not entitle him to claim incidental and speculative profits, which possibly might have been made.<sup>4</sup>

<sup>1</sup> *Freeman v. Clute*, 3 Barbour, (Sup. Ct.) R. 425.

<sup>2</sup> *Street v. Blay*, 2 B. & Ad. R. 460.

<sup>3</sup> *Poulton v. Lattimore*, 9 B. & C. R. 259; 4 Man. & Ry. R. 208; *Adam v. Richards*, 2 H. B. R. 573; *Freeman v. Clute*, 3 Barbour, (Sup. Ct.) R. 425.

<sup>4</sup> *Freeman v. Clute*, 3 Barbour, (Sup. Ct.) R. 424. In this case there was a contract for a steam-engine with a suitable boiler, which, when they were put up, proved to be so defective as not to accomplish the end for which they were designed, and three months was occupied in endeavoring to make them useful, but without success. In delivering the judgment of the court, Mr. Justice Harris said: "I agree with the counsel for the plaintiff in the general rule for which he contends, that the party complaining of a breach of an executory contract is entitled to indemnity for the loss which the non-performance of the obligation by the other party has occasioned him, and for the gain of which it has deprived him. But the gain contemplated by this rule is only that which is the direct and immediate fruit of the contract. Such gain may as properly be regarded, in estimating the damages resulting from a failure to perform a contract, as any actual loss the party may sustain. But even the civil law rule, which is more liberal than the common law in the measure of damages for the violation of an executory contract, confines the allowance for the loss of profits to 'the particular thing which is the object of the contract,' and does not embrace such loss of profits as may have been incidentally occasioned in respect to his other affairs. I cannot agree with the counsel for the plaintiff, that the estimated profits upon the manufacture of a specified quantity of flaxseed into linseed oil, constitutes a legitimate item of

§ 849 b. The vendee of warranted goods may, however, recover damages for all injuries directly or incidentally occa-

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damages against the defendants. Such profits are entirely too speculative and uncertain to make them a measure of damages. ‘It is a very easy matter,’ says Chief Justice Nelson, in *Masterton v. The Mayor of Brooklyn*, 7 Hill, R. 73, ‘to figure out large profits upon paper; but it will be found that these, in a great majority of cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance.’ There are few who have been so fortunate in their enterprises as not to have learned how great is the difference between speculative estimates of profits and the actual test of experience. Certainly such profits rest too much in speculation to make the loss of the chance of acquiring them the proper subject of consequential damages upon the breach of a contract, unless expressly stipulated for in the contract itself.

“The view that I have taken of this question seems fully sustained by adjudged cases, both in this country and in England. The case of *Blanchard v. Ely*, 21 Wend. R. 342, bears, in most of its features, a nearer resemblance to this case than any other I have found. There the plaintiff had contracted to build for the defendants a steamboat, intended to *ply on the Susquehanna river* from Owego to Wilkesbarre, and to have the boat completed and put in operation by a certain day; for which he was to receive a stipulated price. The plaintiff, having delivered the boat, brought an action for the price; and, by way of recoupment of damages, the defendants proved that some of the machinery of the boat was defective, in consequence of which they had incurred expenses in making repairs and improvements; that the boat had also been subjected to delays and loss of profits, which amounted to \$100 each trip. The circuit judge allowed the jury to deduct the amount expended by the defendants *in remedying the defects* in the machinery, and in towing the boat to a proper place to have the repairs made, but directed them not to allow for delays or profits which might have been made upon the trips lost. The Supreme Court sustained the charge of the judge. Although the case under consideration may be, and I think is, distinguishable from that just cited, in respect to the question of delays, I cannot see how it can be distinguished with respect to the profits which might have been made but for loss of trips.

“In *Driggs v. Dwight*, 17 Wend. R. 71, it was held that a party who had entered into a contract with another for a loan of a tavern stand, and who had, in pursuance of such agreement, broken up his former residence and removed to the place where he was to occupy the tavern stand, might, in an action to recover damages for a breach of the contract, in not giving him a lease of the tavern, recover the expenses he had thus incurred. And the

sioned by a breach of warranty. Thus, where the vendee, before discovering the defect or unsoundness of the goods which he has bought under a warranty, sells them under a similar warranty, and is sued thereon, he may recover of his vendor the costs of such suit, as a part of the damages actually sustained by him in consequence of the original breach of warranty.<sup>1</sup> He should, however, give reasonable notice of the suit to the original vendor.<sup>2</sup>

§ 849 c. Where the sale is *conditional* upon the performance of some future act by the vendee, and possession of the prop-

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court also say that ‘the measure of damages certainly is not confined to the difference of rent, *but that the jury might look to the actual value of the bargain the plaintiff had made.*’ The principle of this case, I think, would justify an allowance to the plaintiff of any expenses he had actually incurred in his business *as a consequence* of the failure of the defendants to perform their contract. The case of *Miller v. The Mariners Church*, 7 Greenl. R. 51, is to the same effect. The plaintiff had contracted to deliver stone for the defendant’s house by a certain time. He failed to deliver by the time specified; but having delivered the stone afterwards, in an action for the price of the stone, the defendants were allowed to recoup in damages the expenses they had *necessarily* incurred by the delay of their workmen for want of the stone.

“The conclusion at which I have arrived, after a careful examination of the facts in this case, and the authorities bearing upon the questions involved, and the principles governing the rule of damages in similar cases, is, that the plaintiff is entitled to recover, in addition to the sum paid by him on account of the machinery, which now amounts, with interest, to about the sum of \$700, the further sum of \$700 for the expenses incurred and the damages sustained by him in consequence of the failure of the defendants to finish the machinery according to their contract. The amount thus allowed embraces the loss of the use of the plaintiff’s mill and other machinery, the fuel consumed, the delay of his workmen employed for the purpose of carrying on his business, and the interest on the amount expended in purchasing stock for the mill. I state thus particularly the grounds of my estimate of damages, to enable the parties, if dissatisfied, the better to review the report.” *Bridge v. Wain*, 1 Stark. R. 504; *Lewis v. Peake*, 7 Taunt. R. 153; *Armstrong v. Percy*, 5 Wend. R. 535.

<sup>1</sup> *Lewis v. Peake*, 7 Taunt. R. 153; *Armstrong v. Percy*, 5 Wend. R. 535.

<sup>2</sup> *Ibid.*

erty is transferred, the vendor may, upon the failure of the vendee to perform the condition, rescind the contract, and maintain *trover* or *replevin* for the goods; but he cannot maintain trover until he has a right to demand possession, and until he has actually made a demand and rescinded the contract.<sup>1</sup> During the intermediate time between the delivery of the property and the performance of the condition, and while the property remains in the hands of the vendee, it may be attached *in invitum* for the debts of the vendee, although he could not *ex suo proprio motu* sell it.<sup>2</sup>

§ 850. Where there is a breach of the agreement or warranty, accompanied with fraud, the buyer may always return the goods or not, at his pleasure. Where there is no fraud, and the warranty goes to the *fitness* of the article, and it proves *wholly* unsuitable; or to the identity of the article, and it proves another thing from that for which it was sold; it may be returned, upon breach of the agreement or warranty.<sup>3</sup> But if the warranty goes to the *degree* of fitness or to the quality, and it proves to be of an inferior quality or fitness, the goods cannot be returned, and the remedy is by action for damages; the measure of which is, the difference between the value of the article as it is, and as it was represented to be. Thus, if a machine be sold for a particular purpose, with a warranty, and it will perform none of its functions, it may be returned; but if it only performs them badly, the remedy is by action for damages. And this seems to be the English rule on a sale of specific goods with a warranty that they correspond to a sample.<sup>4</sup>

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<sup>1</sup> Fairbank *v.* Phelps, 22 Pick. R. 536; Ayer *v.* Bartlett, 9 Pick. R. 56; Smith *v.* Plomer, 15 East, R. 607; Gordon *v.* Harper, 7 T. R. 9; Wheeler *v.* Train, 3 Pick. R. 258.

<sup>2</sup> Ibid. Ayer *v.* Bartlett, 9 Pick. R. 156.

<sup>3</sup> Stinson *v.* Walker, 21 Maine R. 211.

<sup>4</sup> Dawson *v.* Collis, 4 Eng. Law & Eq. R. 338.

§ 851. Where there is a *total* defect of title, the buyer may rescind the contract. So, also, a partial defect of title, which would render the thing sold unfit for the use known to be intended, and not within the inducement to the purchase, is sufficient to entitle the buyer to rescind the contract. But such a partial failure of title must be in regard to a part essential to the enjoyment of the residue; and the failure of title in respect to a trifling or non-essential portion will only afford a ground for a *pro tanto* reduction of the price.<sup>1</sup>

§ 851 *a.* Where a person acquires property under a contract of sale, by means of false and fraudulent representations in respect to his solvency and means of paying therefor, he acquires no right either of property or of possession; and the vendor may retake the property, using no more force than is necessary for that purpose; and if he be resisted by the vendee, he may still use such force as is necessary;<sup>2</sup> or the vendor may recover the goods in an action of trover or replevin, unless they have passed to a third person holding them *bona fide* for a valuable consideration, without notice.<sup>3</sup> And where a person makes a fraudulent purchase of goods, and gives his acceptance therefor, and deposits them with a third person, it is not necessary that a tender should first be made, in order to enable the seller to retake the goods.<sup>4</sup>

<sup>1</sup> Halsey *v.* Grant, 13 Ves. R. 78; Stapylton *v.* Scott, 13 Ves. 426; Milligan *v.* Cooke, 16 Ves. R. 1; King *v.* Bardeau, 6 Johns. Ch. R. 38; Smith *v.* Tolcher, 4 Russ. R. 305; Pringle *v.* Witten, 1 Bay, R. 256; Glover *v.* Smith, 1 Eq. R. S. C. 433; Tunno *v.* Fludd, 1 McCord, R. 121; Stoddard *v.* Smith, 5 Binn. R. 355. There is much diversity in regard to this rule among the different cases, and there is no positive and settled rule upon the subject; but the doctrine, as stated in the text, seems to be the sound and equitable doctrine, and the better founded in authority, as well as in good-sense. See 2 Kent, Comm. Lect. 39, p. 475, 476. See ante, Mistake, § 414, 415.

<sup>2</sup> Hodgeden *v.* Hubbard, 18 Verm. (3 Washburn,) R. 504; Johnson *v.* Peck, 1 Woodbury & Minot, (S. C.) R. 334.

<sup>3</sup> Johnson *v.* Peck, 1 Woodbury & Minot, (S. C.) R. 334; Hoffman *v.* Noble, 6 Metcalf, R. 74. See ante, § 844 *c*, 844 *d*.

<sup>4</sup> Nellis *v.* Bradley, 1 Sandford, (Sup. Ct.) R. 560.

§ 851 b. Where the vendor has acquired possession of property wrongfully, and without the knowledge, connivance, or assent of the owner, as where he has stolen or found them, or holds them merely as bailee, with no express or implied authority to sell, the original owner may reclaim them from the hands of a subsequent *bonâ fide* purchaser for a valuable consideration.<sup>1</sup> The reason of this rule is, that until the original owner has expressly or impliedly agreed to part with his rights of property, or has done some act, which operates to deceive the vendee into a belief that the vendor has a right to sell, the wrongful act of a third party, without the fault of the owner, ought not to divest from him his property.

§ 851 c. But where he has voluntarily parted with his property of goods, and given a title therein to the vendee, he cannot reclaim them from a third party, who has become a purchaser from such vendee, for a valuable consideration, without notice, on the ground of fraud by his own vendee; for although fraud renders the contract voidable, at the instance of the party deceived, it does not render it *ab origine* void.<sup>2</sup> And, therefore, as the original owner has voluntarily parted with the goods, and given to his vendee a title, which is good until it is avoided, it is through his own act that the vendee is

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<sup>1</sup> Williams *v.* Merle, 11 Wend. R. 80; Everett *v.* Coffin, 6 Wend. R. 609; Kinder *v.* Shaw, 2 Mass. R. 398; Hartop *v.* Hoare, 1 Wils. R. 8; 2 Strange, R. 1187; Wheelwright *v.* Depeyster, 1 Johns. R. 471; Dame *v.* Baldwin, 8 Mass. R. 519; Towne *v.* Collins, 14 Mass. R. 500; Mowrey *v.* Walsh, 8 Cowen, R. 238; Chism *v.* Woods, Hardin, R. 531; Heacock *v.* Walker, 1 Tyler, R. 338.

<sup>2</sup> Rowley *v.* Bigelow, 12 Pick. R. 307; Ash *v.* Putnam, 1 Hill, R. 306; White *v.* Garden, 5 Eng. Law & Eq. R. 379; Trott *v.* Warren, 11 Maine, R. 227; Hoffman *v.* Noble, 6 Metcalf, R. 68; George *v.* Kemble, 24 Pick. R. 241; Irving *v.* Motley, 7 Bing. R. 543; s. c. 5 Moore & Payne, R. 380; Barnes *v.* Bartlett, 15 Pick. R. 71; Pickering *v.* Busk, 15 East, R. 38; Fenn *v.* Harrison, 3 T. R. 760; Story on Agency, § 73, and note (3,) § 126, § 127, § 452. See Story on Sales, § 200, § 201, § 202. And the same rule applies to sales of real estate. Somes *v.* Brewer, 2 Pick. R. 184.

enabled to resell, and a *bond fide* purchaser, without knowledge of the circumstances, ought not, therefore, to suffer. If, indeed, the second sale be without consideration, or if the third party purchase with knowledge of the fraud, the original owner may reclaim the goods or their proceeds from him.<sup>1</sup>

§ 851 d. So, also, if the owner place his property in the hands of another person, under such circumstances, or in such a manner, that the law implies a right and power on the part of that person to make a valid sale, a sale by him will be good, although he be not authorized by the owner to sell. Thus, if a principal hold out an agent as having authority to sell for him, and the agent sell to a *bond fide* purchaser, in violation of his private instructions, the sale is binding against the principal.<sup>2</sup>

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<sup>1</sup> *Lloyd v. Brewster*, 4 Paige, Ch. R. 537.

<sup>2</sup> *Ante*, § 131 to § 135.

## CHAPTER XXIII.

## GUARANTY.

§ 852. A GUARANTY is an engagement to be responsible for the debts or duty of a third person, in the event of his failure to fulfil his engagement.<sup>1</sup>

§ 853. The contract of guaranty, like all other contracts, requires both a proposal and an acceptance thereof. If, therefore, an offer of guaranty be made to any person, it becomes the duty of such person to give notice to the guarantor of his acceptance thereof, or there will be no contract.<sup>2</sup>

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<sup>1</sup> The contract of suretyship is coeval with the first contracts recorded in history. In Genesis it is related, that when Joseph sent back his brethren to their father's house to bring Benjamin to him, Simeon was retained as surety. (Gen. chap. xlii.) Solomon has some pithy sayings among his proverbs, and strenuously advises against entering into the obligations of surety. He says: "Be not thou one of those that strike hands; or of them that are sureties for debts" (xxii. 26); and also, "A man void of understanding striketh hands, and becometh surety;" and "He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure." Nevertheless, despite Solomon's wisdom, and the saying of Thales, "*Sponde noxa præsto est*," and of Amyot, "*Qui repond, paye;*" this contract is made daily; for generosity and friendship will exist, in defiance of prudence and selfishness.

<sup>2</sup> *Mozley v. Tinkler*, 1 Cromp. Mees. & Rose. R. 692; s. c. 5 *Tyrw.* R. 416; *Edmondston v. Drake*, 5 Peters, R. 624; *Douglass v. Reynolds*, 7 Peters, R. 113; *Lee v. Dick*, 10 Peters, R. 482; *Adams v. Jones*, 12 Peters, R. 207; *Reynolds v. Douglass*, 12 Peters, R. 497; *Allen v. Pike*, 3 *Cush.* R. 238; *Mussey v. Rayner*, 22 *Pick.* R. 223.

§ 854. To create a contract of guaranty or suretyship, the language used must express, in a clear and explicit manner, an intention, on the part of the guarantor, to assume the liability of a surety, upon the default of the principal.<sup>1</sup> If the language be doubtful or ambiguous, it will not be sufficient to create a contract of guaranty. A guaranty is, however, always treated as a mercantile instrument, and is to be construed so as to give effect to whatever is fairly presumable to be the intention and understanding of the parties thereto, and not according to any strictly technical nicety.<sup>2</sup>

§ 855. So, also, the contract of guaranty is void, if it be without consideration;<sup>3</sup> but a trifling consideration is sufficient.<sup>4</sup> The consideration must be executory, either wholly or in part; and it must be in respect of a new debt, or future act.<sup>5</sup> Where the original debt and the guaranty are contemporaneous, no other consideration is necessary than that which moves between the creditor and the original debtor.<sup>6</sup> But if a promise of guaranty be made in respect to a debt which is already incurred, it will be void for want of consideration, unless there be some new consideration to support it.<sup>7</sup> A guaranty of a note is, therefore, without consideration, unless the undertaking be contemporaneous with the original debt; or unless

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<sup>1</sup> *Russell v. Clark's Executors*, 7 Cranch, R. 69.

<sup>2</sup> *Lee v. Dick*, 10 Peters, R. 482; *Douglass v. Reynolds*, 7 Peters, R. 122; *Bell v. Bruen*, 17 Peters, R. 161; *s. c. 1 Howard, S. C. R.* 169.

<sup>3</sup> See *Cobb v. Page*, 17 Penn. St. R. 469; *Cutler v. Everett*, 33 Maine R. 201; *Ware v. Adams*, 24 Maine R. 177.

<sup>4</sup> *Lawrence v. McCalmont*, 2 Howard, R. 426.

<sup>5</sup> *Bailey v. Freeman*, 4 Johns. R. 280; *Leonard v. Vredenburgh*, 8 Johns. R. 29; *Chater v. Beckett*, 7 T. R. 203; *Elliott v. Giese*, 7 Har. & Johns. R. 457; *Fish v. Hutchinson*, 2 Wils. R. 94.

<sup>6</sup> *Gilligan v. Boardman*, 29 Maine R. 79; *How v. Kimball*, 2 McLean, R. 103.

<sup>7</sup> See *Haigh v. Brooks*, 10 Adolph. & Ell. R. 309; *Hawes v. Armstrong*, 1 Bing. New Cases, R. 761; *Gilman v. Kibler*, 5 Humph. R. 19; *Bebce v. Moore*, 3 McLean, R. 387; *Keen v. McKinsey*, 2 Barr, R. 30.

there be some new consideration therefor.<sup>1</sup> The consideration need not move, however, directly between the person giving and the person receiving the guaranty. It is sufficient, if the person for whom the guaranty is given, receive a benefit; or if the person to whom it is given receive, or may receive, a detriment.<sup>2</sup> Nor is it necessary that the consideration of the guaranty should be stated in express terms; for if it be fairly implied from the language used, it will, ordinarily, be sufficient.<sup>3</sup>

§ 856. The law, in some cases, implies a promise of indemnity or guaranty, from the relation of the parties. Thus, in the case of agents, the principal is considered as promising to indemnify them for all acts done within the scope of their authority.<sup>4</sup> So, also, a landlord is presumed to promise to his tenant, that rent shall be exacted from him by no other person than himself.<sup>5</sup> So, also, there is an implied promise between co-guarantors, to contribute proportionally towards discharging any liability, which they may incur in behalf of their principal.<sup>6</sup> So, also, there is an implied promise, on the part of a principal, to indemnify his surety or bail. But if a surety defend against an action brought to recover moneys due from his principal, he cannot recover contribution for the costs of his

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<sup>1</sup> Payne *v.* Wilson, 1 Man. & Ry. R. 708; s. c. 7 B. & C. R. 423; Fell on Guaranties, 8. See D'Wolf *v.* Rabaud, 1 Peters, R. 476; Ware *v.* Adams, 24 Maine R. 177; Pike *v.* Irwin, 1 Sandf. R. 14; Blake *v.* Pavlin, 22 Maine R. 395; Bell *v.* Welch, 9 Comm. B. R. 154.

<sup>2</sup> Morley *v.* Boothby, 10 Moore, R. 395; s. c. 3 Bing. R. 107. See Bickford *v.* Gibbs, 8 Cush. R. 156; Klein *v.* Currier, 14 Illinois R. 237; Campbell *v.* Knapp, 15 Penn. St. R. 27.

<sup>3</sup> Raikes *v.* Todd, 8 Ad. & Ell. R. 855; James *v.* Williams, 5 B. & Ad. R. 1109. See Bainbridge *v.* Wade, 1 Eng. Law & Eq. R. 238.

<sup>4</sup> Story on Agency, § 339, 340.

<sup>5</sup> Merryweather *v.* Nixan, 8 T. R. 186; Adamson *v.* Jarvis, 12 Moore, R. 241; s. c. 4 Bing. R. 66; Upton *v.* Fergusson, 3 Moore & Scott, R. 88.

<sup>6</sup> Davies *v.* Humphreys, 6 M. & W. R. 168.

cosurety, unless he have been authorized to defend.<sup>1</sup> So, also, the creditor cannot recover of the surety the costs of a useless suit against the principal, without his assent.<sup>2</sup>

§ 857. An agreement, however, to indemnify against an act known to be illegal, or an immoral act, to be done at some future time, is void. But a person may make a contract to indemnify another against the consequences of an illegal or immoral act already done.<sup>3</sup> So, also, if two persons jointly commit a tort knowingly, and one of them pay the damages recovered against them or him by the injured party, there is no implied promise, on the part of his co-surety, to pay his share.<sup>4</sup> If, however, the party suing for contribution against his cosurety, were not actually cognizant of the tort, nor accessory thereto, but only by inference of law, and because of the relation between them; as where a stage-coach proprietor is made responsible by the careless driving of his co-proprietor or agent, this rule does not apply. And, indeed, the rule is restricted to cases, where the party asking for contribution against a co-wrongdoer, must be presumed to have been actually cognizant of, and accessory to the tort.<sup>5</sup>

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<sup>1</sup> *Knight v. Hughes*, M. & M. R. 247; s. c. 3 C. & P. R. 467. As to cases in general, upon costs allowed or not, see *Short v. Kalloway*, 11 Adolph. & Ell. R. 28; *Neale v. Wyllie*, 3 Barn. & Cres. R. 533; *Smith v. Compton*, 3 Barn. & Adolph. R. 407; *Lewis v. Peake*, 7 Taunt. R. 153.

<sup>2</sup> *Roach v. Thompson*, Mood. & Malk. R. 487; *Gillett v. Rippon*, Mood. & Malk. R. 406; *Baker v. Garratt*, 3 Bing. R. 56.

<sup>3</sup> *Shackell v. Rosier*, 3 Scott, R. 59; *Kneeland v. Rogers*, 2 Hall, R. 579; *Hackett v. Tilly*, 11 Mod. R. 98; *Fox v. Tilly*, 6 Mod. R. 225; *Doty v. Wilson*, 14 Johns. R. 381; *Stone v. Hooker*, 9 Cow. R. 154; *Ayer v. Hutchins*, 4 Mass. R. 370; *Churchill v. Perkins*, 5 Mass. R. 541; *Hodsdon v. Wilkins*, 7 Greenl. R. 113.

<sup>4</sup> *Merryweather v. Nixan*, 8 T. R. 186; *Adamson v. Jarvis*, 12 Moore, R. 241; s. c. 4 Bing. R. 66; *Farebrother v. Ansley*, 1 Camp. R. 343; *Armstrong v. Toler*, 11 Wheat. R. 258.

<sup>5</sup> *Adamson v. Jarvis*, 12 Moore, R. 241; s. c. 4 Bing. R. 66; *Pearson v. Skelton*, 1 Mees. & Welsb. R. 504; *Wooley v. Batte*, 2 Car. & Payne, R. 417; *Betts v. Gibbins*, 2 Adolph. & Ell. R. 57. See post, § 562.

§ 858. When a contract is to be deemed an original contract by the promisor, and when he is to be deemed a mere guarantor, is sometimes a matter of considerable nicety. And in this respect no distinct rule can be laid down, but every case must be decided upon its own circumstances, the criterion in all cases being the intention and understanding of the parties. If credit be given primarily to any person with his consent, he is not a guarantor; and if a person undertake to pay the debt of another, he must look to it that the form of the contract imports only a conditional liability, and that the party for whom he undertakes is primarily and legally liable, and can be sued. Thus, where a person gave the following written promise: "In consideration of your discharging Bacon out of custody in this action, I undertake he shall pay the debt to you, with interest, by four equal half-yearly instalments; the first on the 17th May, 1839," Bacon being at that time in custody, under a *ca. sa.* for the debt in question, and he was accordingly discharged; it was held that it was an original promise by the promisor, and not a mere guaranty, because Bacon was no longer liable for the debt, and was discharged therefrom.<sup>1</sup> So, also, where goods were furnished to an infant at the request of the defendant, his undertaking to pay for them was held to create an original liability, because there could be no liability on the part of the infant.<sup>2</sup>

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<sup>1</sup> *Lane v. Burghart*, 1 Adolph. & Ell. N. S. R. 933; *Goodman v. Chase*, 1 Barn. & Ald. R. 297.

<sup>2</sup> *Harris v. Huntbach*, 1 Burr. R. 373; *Dunscombe v. Tickridge, Aleyn*, R. 94.

## CHAPTER XXIV.

OF THE FORM OF A CONTRACT OF GUARANTY, AS AFFECTED BY  
THE STATUTE OF FRAUDS.

§ 859. THE English statute of frauds enacts, that "no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The general provisions of this statute have been adopted throughout the United States.

§ 860. This clause refers not only to promises to answer for the default and miscarriage of another person arising out of his *contract*, but also for any default or miscarriage arising out of his *tort*;<sup>1</sup> as where A. had, without leave, wrongfully ridden to death a horse belonging to B., and C. orally guaranteed the payment of a sum of money to B. in satisfaction of the injury by A., in consideration that B. would not bring his action against A.; it was held to be a promise within the purview of this clause in the statute, which should have been in writing.<sup>2</sup>

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<sup>1</sup> Kirkham *v.* Marter, 2 Barn. & Ald. R. 613; Buckmyr *v.* Darnall, Lord Raym. 1085; Salk. R. 28; Green *v.* Cresswell, 10 Adolph. & Ell. R. 453.

<sup>2</sup> Kirkham *v.* Marter, 2 Barn. & Ald. R. 613.

§ 861. The statute only applies to collateral engagements; that is, to engagements upon which the guarantor is only conditionally liable, upon the default of some other person, who is solely liable originally. It was formerly held, that a promise made *before* the delivery of goods supplied to a third party was an original undertaking, and not within the statute, which applied only to promises made *after* the delivery of goods. But this distinction is now exploded, as wholly unsound; and whether the promise be made as a guaranty of a subsisting debt, or in reference to a future debt, it is equally within the statute, provided that the guarantor is not to be looked to as the original debtor.<sup>1</sup> But if the guarantor be in any manner a party to the original promise, and liable coextensively with the other party, in the first instance, and not upon his default alone, the statute does not apply. The questions are, to whom did the guarantee originally look for the primary fulfilment of the engagement? And if there be no default, who is the person solely liable? If the contract of the guarantor be separate and incidental, and conditioned upon the default of the principal party, the statute applies; and otherwise, it does not.<sup>2</sup> If, therefore, a promise be made to pay an already existing debt, or to answer in damages for an already incurred liability of default, the undertaking must be founded upon a new consideration, and care must be taken not to assume a primary liability, or the contract will become an original debt, and, therefore, not within the terms of the statute.<sup>3</sup> The mere fact that the promise is to pay a debt due

<sup>1</sup> *Peckham v. Faria*, 3 Doug. R. 13; *Matson v. Wharam*, 2 T. R. 80; *Barber v. Fox*, 1 Stark. R. 270.

<sup>2</sup> *Austen v. Baker*, 12 Mod. R. 250; *Darnell v. Tratt*, 2 Car. & Payne, R. 82; *Rains v. Storry*, 3 Car. & Payne, R. 130; *Brady v. Sackrider*, 1 Sandf. Sup. C. R. 514; *Carville v. Crane*, 5 Hill, R. 483; *Cahill v. Bigelow*, 18 Pick. R. 369.

<sup>3</sup> Fell on *Guaranties*, ch. 11, p. 31, § 16; *Chase v. Day*, 17 Johns. R. 114; *Leonard v. Vredenburgh*, 8 Johns. R. 29; *Buller, N. P. R.* 281; *Kent, Comm. Lect.* 44, p. 122; *Hunt v. Adams*, 5 Mass. R. 358; *Williams v. Leper*, 3 Burr. R. 1886; *Atkinson v. Carter*, 2 Chitty, R. 403; *Clark v. Small*, 6 Yerg. Term.

from a third party, or to pay for goods to be furnished to a third party, does not prove that the promise does not create an original liability, since it is perfectly competent to a man to assume, on sufficient consideration, to pay the debt of another. Thus, a promise by A. to B. to pay a debt due from B. to C. is not a promise to pay the debt of *another*, within the statute of frauds.<sup>1</sup> It has been said, that if two come into a shop, and one buys, and the other, to gain him credit, promises the seller, "If he does not pay you, I will," this is a collateral undertaking, void without writing by the statute; but if he says, "Let him have the goods; I will be your paymaster;" or, "I will see you paid;" this is an undertaking, as for himself, for which he is originally liable.<sup>2</sup> But on the sale and delivery of goods to a purchaser, for which another promises to pay, unless the whole credit be given to the latter, his undertaking is treated as collateral, and must be in writing.<sup>3</sup> Whether, in the particular case, the person charged intended to render himself originally responsible, is a question to be decided upon the circumstances of the case, and is matter of evidence.<sup>4</sup>

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R. 418; *Eastwood v. Kenyon*, 3 P. & Dav. R. 280; *Haigh v. Brooks*, 10 Adolph. & Ell. R. 309; *Elder v. Warfield*, 7 Harr. & J. R. 391; *Rogers v. Kneeland*, 13 Wend. R. 114; *Cahill v. Bigelow*, 18 Pick. 369; *Tomlinson v. Gell*, 1 Nev. & P. R. 588; s. c. 6 Ad. & Ell. R. 564; *Wood v. Benson*, 2 C. & J. R. 94. See, also, *D'Wolf v. Rabaud*, 1 Peters, R. 476.

<sup>1</sup> *Alger v. Scoville*, 1 Gray, R. 391; *Pike v. Brown*, 7 Cush. R. 133; *Eastwood v. Kenyon*, 11 Ad. & Ell. R. 446.

<sup>2</sup> *Berkmyr v. Barrell*, 1 Salk. R. 27.

<sup>3</sup> *Brady v. Sackrider*, 1 Sandf. Sup. Ct. R. 514.

<sup>4</sup> *Keate v. Temple*, 1 B. & P. R. 158. See *D'Wolf v. Rabaud*, 1 Peters, R. 476; *Lane v. Burghart*, 1 Adolph. & Ell. R. (N. S.) 933; *Goodman v. Chase*, 1 Barn. & Ald. R. 297; *Bushell v. Beavan*, 1 Bing. New Cas. 103; *Simpson v. Penton*, 2 Cromp. & Mees. R. 430. In this case Mr. Justice Bayley said: "I think that the expressions, 'I'll be answerable,' and 'I'll see you paid,' are equivocal expressions. And then we ought to look to the circumstances, to see what the contract between the parties was. I do not say that without authority; for there was a case, which I believe will be found in the 2d vol. of *Douglas*, in which the Court of King's Bench said, that a contract might be

§ 862. Any kind of written paper, which either contains the terms of the agreement, or refers to another paper of any kind, by which they can be ascertained, is a sufficient "memorandum, or note in writing," within the meaning of the statute.<sup>1</sup> But it will be observed, that the statute requires some note or memorandum of the "agreement," and not of the special promise. The construction given to the term agreement, in England, has been, that it includes both the promise and the consideration, and that no memorandum is within the statute, unless the consideration, as well as the promise, be stated.<sup>2</sup> Where, therefore, a guaranty was in the following

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collateral or not, according to circumstances; and that it depends on the circumstances whether it is collateral or not. It was the case of *Oldham v. Allen*, and was decided in Michaelmas Term, in the 24th of Geo. III. There the defendant had sent for a farrier to attend some horses, and said to the farrier, 'I will see you paid.' The plaintiff knew the parties who were owners of some of the horses, and made them debtors, but debited the defendant for the others, whose owners he did not know. The court held that the promise was original in respect of those owners whose names he did not know; but, in respect of the others whom he did know, that it was collateral." See, also, *Dixon v. Hatfield*, 10 Moore, R. 42; 2 Bing. R. 439; *Andrews v. Smith*, 2 Cromp. Mees. & Rosc. R. 627; *Sweeting v. Asplin*, 7 Mees. & Welsb. R. 173; *Stanley v. Hendricks*, 13 Iredell, R. 86; *Blount v. Hawkins*, 19 Ala. R. 100; *Tindal v. Touchberry*, 3 Stroh. R. 177; *Hopkins v. Richardson*, 9 Grattan, R. 485; *Flanders v. Crolius*, 1 Duer, R. 206; *Sinclair v. Richardson*, 12 Verm. R. 33.

<sup>1</sup> *Redhead v. Cater*, 1 Stark. R. 14; s. c. 4 Camp. R. 188; *Stead v. Liddard*, 8 Moore, R. 2; s. c. 1 Bing. R. 196; *Sandilands v. Marsh*, 2 B. & Ald. R. 680; *Coe v. Duffield*, 7 Moore, R. 252; *Jackson v. Lowe*, 7 Moore, R. 219; *Hemming v. Perry*, 2 M. & P. R. 375; *Hare v. Rickards*, 5 M. & P. R. 35; s. c. 7 Bing. R. 254; *Emmott v. Kearns*, 5 Bing. N. C. R. 559; 7 Scott, R. 687.

<sup>2</sup> This construction was unknown until the case of *Wain v. Warlters*, 5 East, R. 10, in which Lord Ellenborough first established the rule. The term agreement had, before then, been construed according to its popular signification; but in view of the known accuracy of Sir Matthew Hale, who was supposed to have drawn the statute, he concluded that the legal signification of the term must have been intended; and that it therefore included both promise and consideration. Since this case, the doctrine, though questioned in *Egerton v. Matthews*, 6 East, R. 307, has been recognized and supported by

form : " 1843, June 28th, Mr. Price, I will see you paid for £5 or £10 worth of leather on the 6th of Dec. for Thomas Lewis, shoemaker: Robert Richardson ;" it was held, that the consideration did not sufficiently appear.<sup>1</sup> It is not neces-

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all subsequent authority. See *Jenkins v. Reynolds*, 3 Brod. & Bing. R. 14; s. c. 6 Moore, 86; *Stadt v. Lill*, 9 East, R. 348; *Lyon v. Lamb*, cited in Fell on Guaranties, Appendix, No. 3; *Morley v. Boothby*, 3 Bing. R. 107; *Cole v. Dyer*, 1 Cr. & Jerv. R. 461; *Hawes v. Armstrong*, 1 Bing. (n. s.) R. 761; *Clancy v. Piggott*, 2 Adolph. & Ell. 473; *Ellis v. Levy*, 1 Scott, R. 669, n. (a). *De Ridder v. Schermerhorn*, 10 Barb. S. C. R. 640. The rule has not, however, met with thorough approbation in England, and has been looked upon as of doubtful policy and propriety. Lord Eldon said, in *Ex parte Gardom*, 15 Ves. R. 286, " Until that case [*Wain v. Warlters*] was decided, some time ago, I had always taken the law to be clear, that, if a man agreed, in writing, to pay the debt of another, it was not necessary that the consideration should appear on the face of the writing." See, also, *Morris v. Stacey*, 1 Holt, N. P. C. 153; *Theobald on Princip. and Surety*, 10, note b.; *Newbury v. Armstrong*, 1 Mood. & Malk. R. 391. It appears, also, by the case of *Ash v. Abdy*, 3 Swanst. R. 664, that the statute of frauds, so far from having been drawn by Sir Matthew Hale, was a mere piece of patchwork. It was originally introduced into the House of Lords by Lord Nottingham, and was there altered by both judges and civilians, and thus arrived at its present form. Lord Ellenborough's reasoning is, therefore, founded upon an incorrect supposition; and the actual history of the statute shows, pretty conclusively, that it was either an oversight, or that the term "agreement" was used in its ordinary and popular sense. Lord Ellenborough himself decided, in *Egerton v. Matthews*, 6 East, R. 307, that a contract for the sale of goods was valid, although it expressed no consideration on the face of it; and this was decided in the face of the 17th section of the statute, requiring a memorandum of every "bargain," for the sale of goods. Surely the same reasoning which he employs to prove that "agreement" means mutual assent, applies with double force to the term "bargain." As to the policy of the construction, as given by Lord Ellenborough, all that need be said is, that it, in fact, nullifies four out of five of all the *bonâ fide* guaranties, given in the course of commercial transactions, and annihilates security given and received in good faith, without conferring any corresponding benefit. The object of the statute evidently was, to secure evidence of the promise, rather than of the consideration, which may easily be proved in most cases, and which is, *prima facie*, proved by the fact of the promise itself.

<sup>1</sup> *Price v. Richardson*, 15 Mees. & Welsb. R. 539.

sary, however, that the exact consideration should be expressly stated, provided a good and valuable consideration can be gathered from the whole agreement.<sup>1</sup> This construction has also been adopted in New York,<sup>2</sup> and in New Hampshire,<sup>3</sup> and in South Carolina.<sup>4</sup> But the courts in Massachusetts have construed the term according to its popular signification, instead of its legal one, and only require that the promise should be set forth in writing.<sup>5</sup> This latter doctrine seems to be better founded in common sense, and in good policy, than the English rule.

§ 863. Whenever it is necessary that a consideration should be expressly stated in the memorandum, it will be sufficient, provided that it can fairly and reasonably be collected, and distinctly implied from the terms of the memorandum.<sup>6</sup> But it must be so referred to, that it can be inferred with certainty, and not as a matter of conjecture, however plausible the conjecture might be in the particular case. Indeed, it must be so

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<sup>1</sup> *Union Bank v. Coster*, 1 Sandf. S. C. R. 565; *Allen v. Jaquish*, 21 Wend. R. 628; *Chapman v. Sutton*, 3 Dowl. & Lowndes, 616; *Boyd v. Moyle*, 2 Mann. Grang. & Scott, R. 644.

<sup>2</sup> *Sears v. Brink*, 3 Johns. R. 210; *Leonard v. Vredenburg*, 8 Johns. R. 29; *D'Wolf v. Rabaud*, 1 Peters, R. 476; *Hunt v. Brown*, 5 Hill, R. 145; *Marrow v. Durham*, 3 Hill, R. 584; *Union Bank v. Coster*, 1 Sandford, S. C. R. 565; *Allen v. Jaquish*, 21 Wend. R. 628.

<sup>3</sup> *Nelson v. Sanborne*, 2 N. H. R. 414.

<sup>4</sup> *Stephens v. Wynn*, 2 Nott & McCord, R. 372, *n.*

<sup>5</sup> This construction is confirmed by the Revised Statutes of Massachusetts, ch. 74, § 2, and also by Maine, New Jersey, North Carolina, and Connecticut. *Lent v. Padelford*, 10 Mass. R. 230; *Packard v. Richardson*, 17 Mass. R. 122; *Levy v. Merrill*, 4 Greenl. R. 180; *Sage v. Wilcox*, 6 Conn. R. 81; *Miller v. Irvine*, 1 Dev. & Bat. R. 103; *Bulkley v. Beardsley*, 2 South. R. 570. In Virginia and Tennessee the word "promise" has been employed in the statute in the place of "agreement." *Violett v. Patton*, 5 Cranch, R. 142; *Taylor v. Ross*, 3 Yerg. R. 330. See, also, *D'Wolf v. Rabaud*, 1 Peters, R. 499.

<sup>6</sup> *Bell v. Bruen*, 17 Peters, R. 161; *James v. Williams*, 5 B. & Ad. 1109; *Newbury v. Armstrong*, Mood. & M. R. 391.

implied, that any person of ordinary capacity would understand what the consideration actually is.<sup>1</sup> If the name of the guarantor appear definitely in any part of the memorandum, so as to identify him, it will be a sufficient signing, to satisfy the terms of the statute.<sup>2</sup> So, also, it is not necessary that the name of the guarantee should appear; and the guaranty may be general, in relation to all or any persons, furnishing goods, or giving credit, on faith of such guaranty.<sup>3</sup>

§ 864. It is not indispensable that a guaranty should be addressed to a particular person, or be given as a security to a particular person. It may be general, as a general letter of credit, and designed as a circulating guaranty in favor of any person who shall advance money or goods upon the faith thereof.<sup>4</sup> In such a case, any person may avail himself of the security thus held out, by giving notice to the guarantor, within a reasonable time, that he has accepted the guaranty, and acted upon it; and the guarantor will be bound for all advances made on the credit thereof.<sup>5</sup> In general cases, the

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<sup>1</sup> *Hawes v. Armstrong*, 1 Scott, R. 661; 1 Bing. N. C. R. 761; 1 Hodges, R. 179; s. c. *Kennaway v. Treleaven*, 5 M. & W. R. 500; *Bentham v. Cooper*, 5 M. & W. R. 621; *Raikes v. Todd*, 8 Adolph. & Ell. R. 846; *Shortrede v. Cheek*, 1 Adolph. & Ell. R. 57; *Emmott v. Kearns*, 5 Bing. New Cas. 559; *Dutchman v. Tooth*, 5 Bing. New Cas. 577; *Haigh v. Brooks*, 10 Adolph. & Ell. R. 319, 320; *Emmett v. Kearns*, 7 Scott, R. 687; 5 Bing. (N. S.) 559.

<sup>2</sup> *Raikes v. Todd*, 8 Adolph. & Ell. R. 856; *James v. Williams*, 5 Barn. & Adolph. R. 1109; *Hawes v. Armstrong*, 1 Bing. New Cas. 761.

<sup>3</sup> *Knight v. Crockford*, 1 Esp. N. P. R. 190; *Ulen v. Kittredge*, 7 Mass. R. 233; *Saunderson v. Jackson*, 2 B. & P. R. 238; *Lemayne v. Stanley*, 3 Lev. R. 1; *Coles v. Trecothic*, 9 Ves. jr. 249; *Lowry v. Adams*, 22 Verm. R. 160.

<sup>4</sup> *Lawrason v. Mason*, 3 Cranch, R. 492; *Fell on Guaranties*, ch. 3, § 18; *Wildes v. Savage*, 1 Story, R. 22; *Union Bank of Louisiana v. Coster*, 1 Sandford, (Sup. Ct.) R. 563.

<sup>5</sup> *Lawrason v. Mason*, 3 Cranch, R. 492; *Boyce v. Edwards*, 4 Peters, R. 121; *Adams v. Jones*, 12 Peters, R. 207; *Wildes v. Savage*, 1 Story, R. 22, 26, 27; *Carnagie v. Morrison*, 2 Metc. R. 381; *Russell v. Wiggin*, 5 Law Reporter, 533; *Story on Bills of Exchange*, § 460, 461, 462, and note, 463; *Bushell v. Beavan*, 1 Bing. New Cas. 103; *Hawes v. Armstrong*, 1

guarantee should be careful to give notice of his acceptance of any *offer* or *tender* of guaranty, for, without his final consent to any proposal to become responsible to him for a debt, the guaranty does not become consummated so as to be binding on the offerer. Thus, where A. wrote to B., "As I understand Messrs. Anderson & Co. have given you an order for rigging, &c., which will amount to about £4,000, I can assure you, from what I know of their honor and probity, that you will be perfectly safe in crediting them to that amount; indeed, *I have no objection* to guarantee you against any loss from giving them this credit:" it was held to be only an offer or proposition of guaranty, which B. was bound to have accepted, if he intended to rely on it.<sup>1</sup>

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Bing. New Cas. 761; Newbury *v.* Armstrong, 6 Bing. R. 201; Pace *v.* Marsh, 1 Bing. R. 216.

<sup>1</sup> McIver *v.* Richardson, 1 M. & S. R. 557; Gaunt *v.* Hill, 1 Stark. R. 10; Mozley *v.* Tinkler, 1 Cromp. Mees. & Rose. R. 692; Jones *v.* Williams, 7 Mees. & Welsb. R. 493. See, also, Craft *v.* Isham, 13 Conn. R. 28; Clark *v.* Remington, 11 Met. R. 361; Howe *v.* Nichols, 22 Maine R. 175; Kay *v.* Allen, 9 Barr, 320; Mussey *v.* Rayner, 22 Pick. R. 223; Menard *v.* Scudder, 7 Louis. Ann. R. 385.

## CHAPTER XXV.

NEGOTIABILITY OF A GUARANTY OF A BILL OF EXCHANGE, OR  
PROMISSORY NOTE.

§ 865. WHERE a general guaranty is made upon the face of a promissory note or bill of exchange, and is not limited to a particular person, or restricted in its terms, but purports to be a guaranty to the payee or his order, or to the bearer, the guaranty is as negotiable as the bill or note, and accompanies it in the hands of every holder.<sup>1</sup> So, also, if the guaranty be on a separate paper, the same rule would seem to obtain, for if the subject-matter of a guaranty be negotiable, so that a change of parties is necessarily contemplated and provided for, the most natural interpretation of the meaning of the parties would be that the guaranty should follow such paper wherever it goes.<sup>2</sup> This rule is, however, restricted to

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<sup>1</sup> McLaren *v.* Watson's Executors, 26 Wend. R. 425; s. c. 19 Wend. R. 557; Walton *v.* Dodson, 3 Car. & Payne, R. 162; Bradley *v.* Carey, 8 Greenl. R. 234; Story on Bills of Exchange, § 458; Adams *v.* Jones, 12 Peters, R. 207; Phillips *v.* Bateman, 16 East, R. 356. But see L'Amoureaux *v.* Hewitt, 5 Wend. R. 307; Upham *v.* Prince, 12 Mass. R. 14; Miller *v.* Gaston, 2 Hill, R. 188; Free *v.* Fuller, 21 Pick. R. 140.

<sup>2</sup> Ibid. Adams *v.* Jones, 12 Peters, R. 207, 213; Walton *v.* Dodson, 3 Car. & Payne, 163. See Bradley *v.* Cary, 8 Greenl. R. 234; Springer *v.* Hutchinson, 19 Maine R. 359. In McLaren *v.* Watson's Executors, 26 Wend. R. 524, Mr. Senator Verplanck said: "There is a clear and manifest difference in the substance of the contract or undertaking itself, in regard to the parties

guaranties of negotiable papers, and does not apply to ordinary mercantile guaranties on a debt, or a purchase, or a credit. But where one indorses a note, before delivery to the payee,

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to whom the guaranty is proffered, and by whom it may be accepted, although it is still governed by the same general legal principles. The ordinary mercantile guaranty of a debt, or a purchase, or a credit, is a stipulation to become liable for another, for some specific debt or debts, not negotiable in the hands of a creditor, and which he cannot pass away. When the debt is contracted on such a guaranty, the primary liability can go no further than the first parties ; and, therefore, there is no promise or undertaking held out by the guarantor to any other person, to give a subsequent credit. Now, as to the undertaking or offer made by a guaranty of payment of negotiable paper. That is a positive undertaking and promise to become liable for its due payment, in case of the default of the original parties ; and this offer is held out to every person who may, on the faith of it, become the legal holder of such paper. It is a promise, or undertaking, held out to a second, third, or fourth indorsee, as much as to the first holder ; and the last of these, who advances his money upon such a guaranty, looks as much as the first to the promise of the guarantor. The offer is of an indefinite number of successive guaranties, whilst, in the case of a guaranty of payment for goods bought on credit, the offer, though it may be general in its address, is only of some specific transaction, which becomes final as to the parties, when the offer is accepted. The guaranty may not be negotiable in itself as a negotiable contract, but it is a collateral promise to any and each, in his turn, of the persons, known or unknown, who may give credit to a negotiable note, coupled with such a guaranty. But, as it can be enforced only by the holder, who is entitled to receive payment from the parties to the note itself, there can be no breach of such an undertaking, or any cause or ground of action, in respect to any one, who, after having made himself a party to the contract, parts with the note, and ceases to be entitled to its payment. I cannot imagine any reason of justice, policy, or legal authority, for giving legal effect to a contract of guaranty for any future credit to another, proffered in writing to any person indiscriminately, who will give such credit, which does not equally apply to the remote holder of a note or bill, who has taken it after successive intermediate holders, but still upon the faith of the original guaranty. He also guarantees the payment of a note, by the very use of those words ; and, in their common, as well as their legal meaning and understanding, hold forth this undertaking or engagement. ‘I promise to any person, who may, upon the faith of this promise, become, by purchase, discount, or otherwise, the *bonâ fide* holder of this note, to pay the same, in case of its not being duly

as "backer," and gives his place of residence, he is considered merely as an indorser.<sup>1</sup>

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paid when at maturity.' The consideration may be either some specific payment, security, or benefit to the guarantor, or it may be merely the value of the note paid at his request, and on his credit, to the person for whose benefit the guaranty is made and intended."

<sup>1</sup> *Seabury v. Mungerford*, 2 Hill, R. 80; *Hall v. Newcomb*, 3 Hill, R. 233.

## CHAPTER XXVI.

## LIABILITY OF GUARANTOR.

§ 866. THE general rule, applicable to the liability of guarantors, is, that it is only coëxcessive with that of the principal, upon the particular transaction, in regard to which such a liability is assumed. It is, however, perfectly competent for the guarantor to assume a liability exceeding that of his principal, if he choose so to do by the terms of his contract. Thus, a person may expressly guarantee to the holder of a note the payment thereof by an indorser, whether proper notice be given or not, and in such case, the guarantor would be liable, when the principal would not. But his liability will be considered as coëxcessive with that of his principal, unless it be expressly limited.<sup>1</sup> So, also, a guarantor is not bound beyond the fair import of the actual terms of his engagement.<sup>2</sup> Thus, if a person become surety for another, in an office of a limited duration, or which the particular incumbent is to hold for a certain period only, he will not be liable beyond such time, even though the limitation do not appear in the condition.<sup>3</sup> Thus, where A. was appointed deputy-post-

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<sup>1</sup> *Curling v. Chalklen*, 3 M. & S. R. 502.

<sup>2</sup> *Miller v. Stewart*, 9 Wheat. R. 680; *United States v. Kirkpatrick*, 9 Wheat. R. 720; *Warden of St. Saviors, Southwark, v. Bostock*, 2 New R. 175.

<sup>3</sup> *Arlington v. Merricke*, 2 Saund. R. 403; *Liverpool Waterworks v. Atkinson*, 6 East, R. 507; *Leadedly v. Evans*, 2 Bing. R. 32; s. c. 9 Moore, R. 102;

master for six months, and the bond was conditioned for the faithful execution of the office by A., "during all the time that he should continue postmaster," and he was reappointed after the six months, and made default thereafter; it was held, that the guarantor was not liable.<sup>1</sup> So, also, where the guaranty relates to a particular office, it extends only to such things as were included in the office at the time when the obligation was created. Thus, where a bond was given by A. as security for a collector of customs, and after the bond was given, a new duty was laid on coals, and the collector was deputed to collect it, and a new security was taken in respect to such new duty; it was held, that the first bond did not extend to this new duty.<sup>2</sup> The guarantor will be bound to the full extent of the terms of his agreement, and they will be construed against him, and in favor of the guaranteee, as far as their reasonable import will allow.<sup>3</sup> But a contract of guaranty will never be construed so as to embrace any thing which is not included within the fair scope of the terms of his agreement.<sup>4</sup> Indeed,

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Peppin *v.* Cooper, 2 B. & Ald. R. 431; Dedham Bank *v.* Chickering, 3 Pick. R. 341; Union Bank *v.* Ridgely, 1 Har. & Gill, R. 432; Kennebeck Bank *v.* Turner, 2 Greenl. R. 42; Worcester Bank *v.* Reed, 9 Mass. R. 268, Rand's note; United States *v.* Kirkpatrick, 9 Wheat. R. 720.

<sup>1</sup> Arlington *v.* Merricke, 2 Saund. R. 403; United States *v.* Kirkpatrick, 9 Wheat. R. 720.

<sup>2</sup> Bartlett *v.* Attorney-General, Parker, R. 277; Bowdage *v.* Attorney-General, Ibid. 278. See Bamford *v.* Iles, 3 Exch. R. 380; Mayor *v.* Oswald, 16 Eng. Law & Eq. R. 236; Frank *v.* Edwards, Ibid. 477, and Bennett's note; Jamison *v.* Cosby, 11 Humphreys, R. 273.

<sup>3</sup> Mason *v.* Pritchard, 12 East, R. 227; Merle *v.* Wells, 2 Camp. R. 413; Sansom *v.* Bell, 2 Camp. R. 39; Hargreave *v.* Smee, 6 Bing. R. 244; s. c. 3 Moore & Payne, R. 573; Evans *v.* Whyle, 3 Moore & Payne, R. 136; Bent *v.* Hartshorn, 1 Metcalf, R. 24; Dick *v.* Lee, 10 Peters, (S. C.) R. 492; Mau ran *v.* Bullus, 16 Peters, (S. C.) R. 528, 536.

<sup>4</sup> Miller *v.* Stewart, 9 Wheat. R. 680; U. S. *v.* Kirkpatrick, 9 Wheat. R. 720; Evans *v.* Wythe, 5 Bing. R. 485. In respect to the interpretation to be given to guaranties, see Bell *v.* Bruen, 1 Howard, (S. C.) R. 186, and Lawrence *v.* McCalmont, 2 Howard, (S. C.) R. 449. In this last case Mr. Justice Story said: "Some remarks have been made on the argument here upon the

the manifest intention of the parties is always the paramount rule for the interpretation of every contract. Whatever can be fairly included within the terms of a guaranty will bind the guarantor,— and extrinsic evidence may be given to ascertain the true import of a letter of guaranty.<sup>1</sup> Thus, where a security was given to a banking-house, an intention was inferred, that it was intended to be given to the *house*, and not to the

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point in what manner letters of guaranty are to be construed; whether they are to receive a strict or a liberal interpretation. We have no difficulty whatsoever in saying, that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation, we do not mean that the words should be forced out of their natural meaning; but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed, and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments, generally drawn up by merchants in brief language, sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world. The remarks made by this court in the case of *Bell v. Bruen*, 1 How. R. 169, 186, meet our entire approbation. The same doctrine was asserted in *Mason v. Pritchard*, 12 East, R. 227, where a guaranty was given for any goods he hath or may supply W. P. with, to the amount of £100; and it was held by the court to be a continuing guaranty for goods supplied at any time to W. P. until the credit was recalled, although goods to more than £100 had been first supplied and paid for; and the court on that occasion distinctly stated that the words were to be taken as strongly against the guarantor as the sense of them would admit of. The same doctrine was fully recognized in *Haigh v. Brooks*, 10 Adol. & Ell. R. 309, and in *Mayer v. Isaac*, 6 Mees. & Welsb. 605, and especially expounded in the opinion of Mr. Baron Alderson. It was the very ground, in connection with the accompanying circumstances, upon which this court acted in *Lee v. Dick*, 10 Peters, R. 482, and in *Mauran v. Bullus*, 16 Peters, R. 528. Indeed, if the language used be ambiguous, and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury."

<sup>1</sup> *Bell v. Bruen*, 1 Howard, (S. C.) R. 169; *Lawrence v. McCalmont*, 2 Howard, (S. C.) R. 426.

special partners, and therefore that the sureties were liable, although there was a change of partners in the house.<sup>1</sup> So, also, a guaranty "for any goods he *hath* or *may* supply," was held to be a continuing guaranty.<sup>2</sup> So, also, a guaranty in the following terms, was held to be a continuing guaranty: "In consideration of your agreeing to supply goods to K. at two months' credit, I agree to guarantee his present or any future debts to the amount of £60. Should he fail to pay at the expiration of the above credit, we hereby bind ourselves to pay you within three days from the date of receiving notice."<sup>3</sup> But this guaranty was held to be restricted to debts for goods sold, and to debts upon the credit of two months.<sup>4</sup> So, also, a writing in these words: "I agree to be responsible for the price of goods purchased of you, either by note or account, at any time hereafter, to the amount of \$100," was held to constitute a continuing guaranty to the extent of one hundred dollars, for goods sold at any time before the recall of the credit.<sup>5</sup> The presumption, however, in all doubtful cases of guaranty, is, that it is not a continuing guaranty, covering an indefinite number of advances, for an indefinite space of time, but is intended to be restricted to the particular transaction, in respect of which it was created.<sup>6</sup> Thus, where a guaranty was in this form: "The object of the present letter is, to request you, if convenient, to furnish Messrs. H. with any sum they may want, as far as \$50,000. We shall hold ourselves answerable to you for the amount;" it was held not to be a con-

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<sup>1</sup> *Barclay v. Lucas*, 1 T. R. 291. This case is cited and approved in *Miller v. Stewart*, (Story, J.) 9 Wheat. R. 680.

<sup>2</sup> *Mason v. Pritchard*, 12 East, R. 227; *Merle v. Wells*, 2 Camp. R. 413; *Sansom v. Bell*, 2 Camp. R. 39. See, also, *Martin v. Wright*, 6 Adolph. & Ell. (N. S.) R. 917; *Clark v. Burdett*, 2 Hall, R. 197; *Grant v. Ridsdale*, 2 Har. & J. R. 186.

<sup>3</sup> *Martin v. Wright*, 6 Adolph. & Ell. (N. S.) R. 917.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Bent v. Hartshorn*, 1 Metcalf, R. 24.

<sup>6</sup> *Cremer v. Higginson*, 1 Mason, R. 323; *Fellows v. Prentiss*, 3 Denio, R. 517, 520; *Campbell v. French*, 6 T. R. 200.

tinuing guaranty.<sup>1</sup> So, also, the following guaranties were held not to be continuing: "I hereby agree to guarantee to you the payment of such an amount of goods at a credit of one year, interest after six months, not exceeding \$500, as you may credit to J. R.;"<sup>2</sup> and "For any sum that my son G. may become indebted to you, not exceeding \$200, I will hold myself accountable."<sup>3</sup> And a guaranty in these words: "We consider Mr. J. V. E. good for all he may want of you, and we will indemnify the same," was held not to be a continuing guaranty, but to be restricted to the amount of such goods as were obtained at the first presentation.<sup>4</sup> So, also, the law will not presume a contract of guaranty, unless the obligation be plainly and explicitly expressed; or unless it be evident that the person charged actually intended to assume the liability of surety.<sup>5</sup> But whether the words used in a particular case will or will not create a continuing guaranty, is often a matter of no small nicety.<sup>6</sup> A surety, however, who has assumed a liability in respect of all sums advanced to his principal, will not be liable for moneys illegally advanced.<sup>7</sup> Where a guaranty is appended to a contract, and makes reference thereto to indicate the liability assumed, the contract becomes a part of the guaranty. Thus, where by an instrument annexed to a lease, A. "covenanted and agreed to become surety for the faithful performance of said Garner's (the lessee) covenants as expressed in the above said lease," it

<sup>1</sup> Cremer *v.* Higginson, 1 Mason, R. 323.

<sup>2</sup> Fellows *v.* Prentiss, 3 Denio, R. 512.

<sup>3</sup> White *v.* Reed, 15 Conn. R. 457.

<sup>4</sup> Whitney *v.* Groot, 24 Wend. R. 82.

<sup>5</sup> Russell *v.* Clarke's Ex'ors, 7 Cranch, R. 69; Campbell *v.* French, 6 T. R. 200.

<sup>6</sup> See Drummond *v.* Prestman, 12 Wheat. R. 515; Douglass *v.* Reynolds, 7 Peters, R. 113; Cremer *v.* Higginson, 1 Mason, R. 323; Dry *v.* Davy, 10 Adolph. & Ell. R. 30; Batson *v.* Spearman, 9 Adolph. & Ell. R. 298; Allan *v.* Kenning, 9 Bing. R. 618; Hargreave *v.* Smee, 6 Bing. R. 244; Kay *v.* Groves, 6 Bing. R. 276; Lawrence *v.* McCalmont, 2 Howard, S. C. R. 426.

<sup>7</sup> Swan *v.* Bank of Scotland, 10 Bligh, (n. s.) R. 627.

was held that both instruments were to be taken together to ascertain the contract of the parties.<sup>1</sup>

§ 867. So, also, where the contract of guaranty or suretyship relates to the business transactions of a certain person, it extends only to the acts of that person individually. Thus, if a guaranty be given of all notes signed by A., it does not extend to notes signed by A. and B., although they be partners.<sup>2</sup> So, also, where a guaranty is given in respect to a particular person, an assumption by him of any new relation in business by which his liability would be extended, or altered materially, as if he should associate himself in business with another person as a partner, would operate as a discharge of the guarantor from all liability.<sup>3</sup> The same rule also applies, where the guaranty is in respect of several individuals; and in such case, any material alteration of their relations, which would affect the risk of the guarantor, would determine the guaranty, unless some provision was made to meet such an event. Thus, if one of several persons, in respect of whom a guaranty is given, should die, the guaranty would be determined, unless it was manifestly intended to continue in behalf of the survivors.<sup>4</sup> So, also, a guaranty in behalf of a firm is determined by any change of partners, because the guarantor is understood to place reliance upon the fidelity and capability of each.<sup>5</sup> So, also, a guarantor is only responsible to the

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<sup>1</sup> *Van Alstyne v. Van Slyck*, 10 Barb. S. C. R. 386.

<sup>2</sup> *Russell v. Perkins*, 1 Mason, R. 368.

<sup>3</sup> *Wright v. Russell*, 3 Wils. R. 530; s. c. 2 Bl. R. 934; *Russell v. Perkins*, 1 Mason, R. 368; *Theobald on Principal and Surety*, 76, 77; *Dry v. Davy*, 10 Adolph. & Ell. R. 50.

<sup>4</sup> *Simson v. Cooke*, 8 Moore, R. 588; s. c. 1 Bing. R. 452; *Kipling v. Turner*, 5 B. & Ald. R. 261; *University of Cambridge v. Baldwin*, 5 M. & Welsb. R. 580; *Weston v. Barton*, 4 Taunt. R. 673; *Cremer v. Higginson*, 1 Mason, R. 323.

<sup>5</sup> *Strange v. Lee*, 3 East, R. 484; *Myers v. Edge*, 7 T. R. 254; *Dry v. Davy*, 2 P. & Dav. R. 249. See *New Haven Bank v. Mitchell*, 15 Conn. R. 206.

guarantee or guarantees named in the obligation.<sup>1</sup> The principle of all these cases is, that wherever a guaranty has been entered into in regard to any species of act or transaction to be done by any person or persons, any material change of mercantile situation voluntarily assumed by such person or persons, will determine the contract; because, by affecting the relations and responsibilities of the guaranteee, the very security on which he depended, and the very consideration of his contract may be impaired.<sup>2</sup>

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<sup>1</sup> Barker *v.* Parker, 1 T. R. 287.

<sup>2</sup> Dance *v.* Girdler, 1 New R. 34.

## CHAPTER XXVII.

## DISCHARGE OF GUARANTOR.

§ 868. INASMUCH as the liability, which the guarantor intends to assume, must depend upon a full knowledge of the terms of the original agreement, it becomes the duty of the party taking a guaranty to put him in possession of all the facts likely materially to affect his responsibility; and if there be any misrepresentation or fraudulent concealment in relation thereto, the contract will be thereby nullified. So, also, if any secret agreement be made between the guarantee and the principal, materially affecting the nature and extent of the obligation of the surety, he is not bound by his contract. Thus, where it was agreed between the vendors and the vendee of goods, that the latter should pay ten shillings per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors, and this agreement was not communicated to the surety; it was held, that it was a fraud upon him, which rendered his guaranty void.<sup>1</sup> The misrepresentation or concealment must, however, be in regard to such a fact as either might have prevented the guarantor from entering into such an agreement, or might increase the extent of his liability.<sup>2</sup> Thus, if a principal, knowing that he had been cheated by an agent, should apply for security for the good conduct of the agent, and conceal

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<sup>1</sup> Pidcock v. Bishop, 5 Dowl. & Ry. R. 505; s. c. 3 Barn. & Cres. R. 605.

<sup>2</sup> Stone v. Compton, 5 Bing. N. C. R. 142.

such fact, and any one, in ignorance thereof, should become surety for the agent, it would be void.<sup>1</sup>

§ 868 a. The question whether a mere concealment of material facts affecting the situation of the parties, without fraudulent intent, would avoid the liability of the surety, has been discussed in the late English cases, and considerable difference of opinion has been manifested by different judges. By some it has been held, that the guarantor is entitled to know all the facts material to his contract, and that the same principles are applicable to sureties as to insurers. But on the other hand, this doctrine is expressly denied in some of the late cases, and it is asserted that the concealment of a material fact will only avoid the contract by a surety when it operates as an actual fraud;<sup>2</sup> although, if the concealment have any taint of

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<sup>1</sup> Maltby's case, 1 Dow, Parl. Cas. R. 294; Franklin Bank *v.* Cooper, 36 Maine R. 195; Smith *v.* The Bank of Scotland, 1 Dow, R. 272.

<sup>2</sup> In Pidcock *v.* Bishop, 3 Barn. & Cres. R. 605, (1825,) Lord Tenterden said: "I am of opinion that a party giving a guarantee ought to be informed of any private bargain made between the vendor and vendee of goods which may have the effect of varying the degree of his responsibility. Here the bargain was, that the vendee should pay, beyond the market price of the goods supplied to him, ten shillings per ton, which was to be applied in payment of an old debt due to one of the plaintiffs. The effect of that would be to compel the vendor to appropriate to the payment of the old debt, a portion of those funds which the surety might reasonably suppose would go toward defraying the debt for the payment of which, he made himself collaterally responsible. Such a bargain, therefore, increased his responsibility. That being so, I am of opinion that the withholding the knowledge of that bargain from the defendant was a fraud upon him, and vitiated the contract." And Mr. Justice Bayley added: "It is the duty of a party taking a guaranty to put the surety in possession of all the facts likely to affect the degree of his responsibility, and if he neglect to do so, it is at his peril." Holroyd, J., said: "I am also of opinion that the contract of the surety is not binding upon him, by reason of the plaintiff's not having communicated to the surety a secret bargain previously made by him, with the vendee of the goods. The effect of that bargain was to divert a portion of the funds of the vendee from being applied to discharge the debt, which he was about to contract with the plaintiffs, and to render the vendee less able to pay for the iron supplied to him.

fraud, it undoubtedly will avoid the contract.<sup>1</sup> Whether the non-disclosure of a material fact, known only to the principal,

The defendant might reasonably suppose that Tickell was to pay only the market price of the iron, but the plaintiff knew that he was to pay more, and did not communicate that fact to the plaintiff. The plaintiff and defendant, therefore, were not on equal terms. The former, with the knowledge of a fact which necessarily must have the effect of increasing the responsibility of the surety, without communicating that fact to him, suffers him to give the guarantee. That was a fraud upon the defendant, and vitiates the contract." Mr. Justice Littledale was of the same opinion. In *Smith v. The Bank of Scotland*, 1 Dow, R. 272, (1813,) the question arose upon a bond of cautionry given by Smith to the Bank of Scotland for one Paterson, the bank agent at Thurso. Paterson having mismanaged the affairs of the bank and become bankrupt, the bank proceeded to enforce the bond, but Smith resisted payment, alleging fraudulent concealment of material facts. The alleged fraudulent concealment consisted in this, that at the time the bank company took the bond of cautionry, they were aware of, or had strong reason to suspect, the misconduct and insolvency of Paterson. Lord Eldon, taking the allegation and the facts, says: "Among the *frauds* was one, though that expression appeared to be considered too harsh, and as it was sometimes called a concealment of material circumstances." He afterwards says: "If an agent had been guilty of embezzlement or other improper conduct unknown to his employer, the cautioner would be liable. But if a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely that he was in his debt; if, under such circumstances, he required sureties for his fidelity, holding him out as a trustworthy person, knowing or having ground to believe that he was not so; then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct even with a view to security against future transactions of the agent." Lord Redesdale said: "If Paterson was the agent of the bank in taking the bond it remained to consider the circumstances under which it was given, and certainly those stated by the noble Lord (Eldon) were highly important and material. If a person had some doubts as to the circumstances of his agent and therefore required fresh sureties, stating his doubts at the same time to these sureties, they would then have no right to complain, though called upon to pay the amount of their engagement. But if he suggested no doubt, but, on the contrary, required additional security upon an alleged increase of business solely, concealing his doubts as to the misconduct of the agent, this was a species of proceeding which placed the person adopting it in *malâ fide* in regard to the surety. If, then, it could be proved that the bank knew that

<sup>1</sup> *Stone v. Compton*, 5 Bing. N. C. R. 142.

would have the same operation is rendered doubtful by the late cases. A distinction should, perhaps, be made between the case

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Paterson was not trustworthy, or had good reason to believe so, and did not inform the sureties of their knowledge or suspicion on that head, but required security upon a ground which could not lead the proposed sureties to suspect that any thing was wrong, and that ground, too, could be proved to have had no existence in fact, all these circumstances would unquestionably be material evidence."

Railton *v.* Mathews, 10 Clark & Finnel. R. 935, (1844,) was also a case where a party became surety on a bond for an agent, payment of which he afterwards refused on the ground that material circumstances had been concealed from him, affecting the agent's credit prior to the bond, and which had he known then would have prevented him from assuming the obligation. The Lord Justice, Clerk, who presided at the trial directed the jury that "the concealment must be, first, of things known to the defenders or which they had strong and grave ground to suspect; secondly, that the concealment, therefore, being undue must be wilful and intentional with a view to the advantage they were thereby to receive." The jury found a verdict in favor of the party to whom the bond was given — sustaining it. On appeal, before the House of Lords, the exceptions were sustained and a new trial ordered for misdirection. Lord Cottenham, in his judgment, says: "The question is, whether there may not have been a case brought before the jury, for their consideration, of improper and undue concealment, (which I understand to mean a non-communication of facts which ought to have been communicated,) which would lead to the relief of the surety, although the non-communication might not be wilful and intentional, and with a view to the advantage which the party was thereby to receive. That which I find here extracted from the charge of the learned judge, I understand to be one proposition. The learned judge lays it down distinctly that the concealment to be undue must be wilful and intentional, with a view to the advantage they were thereby to receive. In my opinion, there may be a case of improper concealment or non-communication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive. The charge, therefore, I conceive, was not consistent with the rule of law." Lord Campbell also stated the same conclusion in even stronger terms. He says: "The question really is, what is the issue which the court directed in this case? 'Whether the pursuer, Edward Railton, was induced to subscribe the said bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them?' The material words are, 'Undue concealment on the part of the defenders.' What is the meaning of those words? I apprehend the meaning of those

where the principal omits to state to the guarantor a material fact of which he alone has cognizance, and the case where both

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words is, whether Railton was induced to subscribe the bond by the defenders having omitted to divulge facts within their knowledge which they were bound in point of law to divulge. If there were facts within their knowledge which they were bound in point of law to divulge, and which they did not divulge, the surety is not bound by the bond; there are plenty of decisions to that effect, both in the law of Scotland and the law of England. If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety; and whether they concealed those facts from one motive or another, I apprehend is wholly immaterial. It certainly is wholly immaterial to the interests of the surety, because, to say that his obligations shall depend upon that which was passing in the mind of the party requiring the bond, appears to me preposterous; for that would make the obligation of the surety depend on whether the other party had a good memory, or whether he was a person of good-sense, or whether he had the motive in his mind, or whether he was aware that those facts ought to be disclosed. The liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not upon what was passing in the mind of the other party, or the motive of the other party. If the facts were such as ought to have been communicated, if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial.

"Then we come to the direction given by the learned judge. He says: 'The concealment, therefore, being undue, must be wilful and intentional, with a view' (and that is with reference to the motive) 'to the advantage they were thereby to receive.' Now, according to my notion of the issue, that is an entire misconception of it: according to this direction, although the parties acquiring the bond had been aware of the most material facts which it was their duty to disclose, and the withholding of which would avoid the bond, if they did not wilfully and intentionally withhold them, that is to say, if they had forgotten them, or if they thought by mistake that in point of law or morality they were not bound to disclose them, then, according to the holding of the learned judge, it would not be a concealment. But the learned judge does not stop there; he goes on, 'with a view to the advantage they were thereby to receive;' introducing those words conjunctively, and, in effect, saying that it was not an undue concealment unless they had their own particular advantage in view. That appears to me a misconception. I will suppose that their motive was kindness to Hickes; to keep back from those who,

he and the third person to whom the guaranty is given omit to disclose a material fact known to both. In both cases it is diffi-

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it was material to him, should continue to have a good opinion of him, the knowledge of those facts; that it was a pure kindness on their part, to prevent those parties entertaining a bad opinion of him, and not from any selfishness, this concealment took place. Although that might be the motive, yet the fact that he was in arrear and had been guilty of fraudulent conduct, and that he was a defaulter, were facts which it was most material for the surety to be acquainted with. If those were held back merely from a kind motive to Hickes, and not at all from any selfish motive on the part of those to whom the bond was to be executed, the effect in point of law would be the same as if the motive were merely the personal benefit of the parties to receive the bond. It appears to me, therefore, that the learned judge has misunderstood the meaning of the issue, and that having told the jury that a concealment to be undue must be wilful and intentional, with a view to the advantage which the parties were thereby to receive, that was a misdirection, and that it had a tendency to mislead the jury; that it was wrong in point of law, and that the exception to that direction ought to be allowed." See, also, *Hamilton v. Watson*, 12 Clark & Finnel. R. 119. In *Owen v. Homan*, 3 Eng. Law & Eq. R. 120, (1850,) Lord Chancellor Truro says: "I am not aware that either the text-books or the decisions distinctly define the extent of the obligation and responsibility which rests upon the creditor in regard to the surety being made acquainted with all the material circumstances connected with the transactions to which the suretyship is to be applied. The cases which are reported have generally arisen out of transactions in which there has been personal communication between the creditor and surety; and the clear law deducible from those decisions is, that the creditor must make a full, fair, and honest communication of every circumstance calculated to influence the discretion of the surety in entering into the required obligation. Lord Cranworth, while sitting as Lord Commissioner, well observed, that the duty of the creditor, in regard to the communication to be made to the surety, assimilated that of the assured in a policy of insurance, who, unasked, is bound to give to the underwriter all the information in his power, to enable him to estimate the character of the risk he is invited to undertake.

" Where communication does take place between the creditor and the surety, the duty of the creditor cannot be better illustrated than by the case of the assured; but, in the case of an insurance, communication necessarily takes place between the assured, or his agent, which is the same thing, and the insurer, but such communication does not always take place between the creditor and the surety. The question arises, whether the party, through whose instrumentality the guaranty or suretyship obligation is created, is to be con-

cult to see why the concealment is not a breach of trust, if the fact were so material, that the guarantor, had he known it,

sidered as the agent of the creditor, the party to be insured, and, therefore, affecting the principal; or if not, how far the validity of his security is affected, if it shall have been obtained by fraud, or by misrepresentation or suppression; or, in other words, does a creditor entirely escape responsibility by desiring his debtor, or party contracting with him, to procure the suretyship contract—the creditor declining, or, at all events, abstaining from communication with the surety? In this case the bill contains no statement leading to the conclusion that any communication took place between the plaintiffs and the defendant, except that, in regard to some of the bills, it is alleged that they were delivered or deposited by the defendant and Bowers with the plaintiffs. The answer contains no statement of any communication between the plaintiffs and the defendant, beyond the allegation that the defendant was once or twice at the banking-house, and that the managing clerk frequently visited her. It does not set forth what took place upon any of those occasions affirmatively; but it expressly denies that she was ever informed of Bowers' being indebted to the plaintiffs, or that any application was ever made to her, until 1849, upon the subject of the notes or bills, or of the debt owing to the plaintiffs. *In Re Pidcock v. Bishop*, 3 Barn. & Cres. R. 605, there does not appear to have been any communication between the creditor and the surety; and in that case the guaranty was held to be void, in consequence of the debtor having forbore to inform a surety of a condition in the contract between the creditor and the debtor, for the performance of which the surety became bound. The case of *Pidcock v. Bishop* was a distinct decision; but there is an *obiter dictum* of a different import in *Stone v. Compton*, 5 Bing. N. C. R. 142. In that case the suretyship contract was held void by reason of an alleged misrepresentation by the creditor to the surety, through his agent. But in the course of the judgment Tindal, C. J., said, that 'a creditor was not responsible for the misrepresentation or non-communication of material circumstances by the debtor, where there is no communication between the creditor and the surety.' The present occasion does not call for the expression of an opinion upon this important question; and before the hearing, the case may be relieved of the question by the evidence which may be given in the cause. It is enough, therefore, to say, at present, that the facts as they now stand, present a strong probability that the defendant was induced to undertake the responsibility, sought to be enforced against her, by misrepresentations, or suppression of the important circumstances in the case; and if that fact shall remain unaltered, a very serious question as to the legal effect of such fact upon the validity of the securities must arise at the hearing." This case was carried up to the House of Lords in 1854, (25 Eng. Law & Eq. R. 1, 12,) and the decision was confirmed, although the principal ground, that

would not have given the guaranty,—but if such fact were unknown to the third person taking the guaranty, there would

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a creditor cannot give time to his principal debtor without discharging the surety, was not acquiesced in. Lord Cranworth says: "Without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated, that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. If a person abstain from inquiry because he sees that the result of inquiry will probably be to show that a transaction in which he is engaged is tainted with fraud, his want of knowledge of the fraud affords no excuse. Now, here, not only were the circumstances such (I take them, of course, solely from the answer) as made the inquiry natural, but they made the abstaining from inquiry unnatural." . . . . "I am aware that the grounds on which my opinion rests are not those, or not exclusively or mainly those, on which Lord Truro relied; he did not, indeed, refer to them; but obviously the main ground of the judgment now under appeal was, that a creditor who has given time to his principal debtor cannot effectually reserve his right against the surety, or, at all events, that the nature of the deeds and transactions in this case prevented the plaintiffs from doing so.

"The view which I have taken of the facts here, makes it unnecessary for me to go into this question; but I should be doing wrong if I did not state, with all deference to the very able judge whose decision is now under review, that I cannot participate in his doubt. So far as relates to the general question, it may possibly be, that here the giving of the bond, and the very special nature of the arrangements, may have created difficulties taking this case out of the general rule; on this point I give no opinion; but that a general rule exists such as is contended for by the plaintiffs, I should, but for the high authority of the judgment now under appeal, have thought to be a matter beyond doubt. I should have thought, on principle as well as on authority, that it must be competent to a creditor to contract with his principal debtor to give him time, so far as he can lawfully and effectually do so without prejudicing his right against the surety; if he may do this by a contract in these express terms, the question in every case must be, whether the contract, however worded, has not that meaning. I must, therefore, guard myself against being thought to acquiesce in the opinion that such a reservation against the sureties is not effectual." *Stone v. Compton*, 5 Bing. N. C. R. 142, was a case of positive misrepresentation.

In the *North British Ins. Co. v. Lloyd*, 28 Eng. Law & Eq. R. 456, (1854.)

be reason to say, that he having acted upon the guaranty, and having been guilty of no concealment himself, ought not to

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the ground is clearly taken, that actual fraud must be made out, and that the mere concealment of a material fact is not sufficient; although such fact, had it been known, would have prevented the guarantor from entering into his obligation. The plaintiffs in this case had lent £10,000 to Sir Thomas Brancker, on the 26th of August, 1846, payable in a year, on the deposit of certain shares, with a stipulation that if the market value of the shares should fall £20 per cent. below £10,000, he should furnish new shares, or pay their value, so as to leave a surplus of £20 per cent. The shares having fallen in value, below that amount, the defendant and three others, in consideration of the plaintiffs' not requiring the deposit of the shares to secure them the interest, guaranteed the payment to the amount of the deficiency, each being liable to a certain share. The defendant was liable to the amount of £500. The action was founded on this guarantee to recover this sum. There was a plea of fraud, and on the trial, before Mr. Justice Crowder, the evidence in support of the plea was that, when the loan was due, a new agreement was made to forbear the call of £10,000 for six months more, on having the additional security of Sir Thomas Brancker's brother, James Brancker, for £2,000, which was given to the plaintiffs. In January, 1848, James Brancker wrote to the plaintiffs' manager, to inform him of the plaintiffs having arranged to replace his security by the guaranty on which the action was brought, and mentioned the terms of it, and the proposed names of the trustees, and the manager received the proposed security as a substitute. The defendant knew nothing of this arrangement, but James Brancker and Sir Thomas Brancker called on them to inform them of the loan and its terms, and told them, unless they could procure security, that the plaintiffs would sell his shares, and then the defendant and others gave the guaranty, the subject of the action, and drawn by the plaintiffs' attorney. It was submitted by the counsel for the defendant, that the plea of fraud was proved; that in case of a surety all the material circumstances known to the creditor must be disclosed, and that the non-disclosure of the fact that Sir Thomas Brancker's brother had withdrawn his guaranty, and substituted the deposit, was an undue concealment of a material fact, and, therefore, constructively a fraud. Pollock, C. B., said: "My brother Crowder was of opinion, that the non-disclosure of material circumstances was not to be considered as a constructive fraud; but he proposed to reserve the point, and in the first instance left the question to the jury, whether the circumstance that the debtor's brother had been a surety for him to the plaintiffs, and withdrawn his suretyship, was a material matter, which ought to have been disclosed by them. The defendant swore that he would not have given his guaranty had he known

suffer for the concealment by the principal,—and that since one or the other party must suffer, the loss should fall upon the

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of the circumstance. The jury found that the substitution was not a circumstance material to be disclosed, and, therefore, the question proposed to be reserved, did not arise; but notwithstanding that finding, it is still contended it was material, and that in the case of a surety the non-disclosure of such a circumstance was a constructive fraud. We are all of opinion that it is not. It occurs to us as not a correct proposition that the same rule prevails in case of guarantees as in assurances on either ships or lives, in which it is a settled rule, no doubt, that all the material circumstances known to the assured are to be disclosed, though there should be no fraud in the concealment. It is a peculiar doctrine, applicable to contracts of insurance in which, in general, the assured knows, and the underwriter does not know, the circumstances of the voyage and of other matters. The cases decided by Lord Eldon, and afterwards by Lord Cottenham, which were cited, as containing the doctrine that there is an obligation on the part of the person guaranteed to disclose all material matters, proceed both on the ground of actual fraud, and not constructive fraud. In *Smith v. The Bank of Scotland*, decided by Lord Eldon, the case proceeded on the ground of a representation to the surety of the trustworthiness of the principal, known, or believed by the banker to be untrue. And, in *Railton v. Mathews*, the point decided by the concurrent opinion of Lord Campbell and Lord Cottenham was, in effect, that it was not necessary, in order to render the concealment by a person fraudulent, that it should be made with a view to the advantage of that person, the Lord Justice Clerk having left that question to the jury in a more complex form. And, again, in *Pidcock v. Bishop*, which was cited, although there was some expression used by Mr. Justice Bailey, as to the necessity of communicating to the surety all the material facts likely to affect the surety, these expressions must be understood with respect to the facts of the particular case to be decided, and certainly that case was decided on the ground of actual fraud. The fact was, that it was a suretyship on the sale of goods, namely, iron; and it was agreed that the iron should be charged 10s. above the market price, in order that the 10s. might be applied to the payment of an old debt, and it is impossible not to see that it is quite on a par with getting a security from an insolvent on a bygone debt, or getting a bankrupt, after he has obtained his certificate, to deal with you and pay an old debt. All the cases have been decided over and over again to be on the same footing as actual fraud, and not constructive fraud. But that the mere relationship of creditor and surety requires, in all cases, a full disclosure of all material circumstances, was distinctly denied by the House of Lords, in the case of *Hamilton v. Watson*; and particularly Lord Campbell, in delivering his

guarantor, since by his guaranty he had induced the third person to trust the principal. But if both principal and third

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judgment, stated, that if the principle contended for, that every thing that was material for the sureties to know should be disclosed by the creditors, was law, it would put an end to giving security on a cash account. If such were the rule, it would become necessary for the bankers to retain the security, and get a statement of how the account was kept; whether the debtor was in the habit of overdrawing his account; whether he was mercantile in his dealings; and whether he ever dishonored his bills; and whether he performed his promises in an honorable manner. All these things are extremely material to know, if you are to form a judgment on the whole case. But unless questions be particularly put by the surety to gain that information, Lord Campbell held it was not necessary for the creditors, to whom the surety was given, to make any such disclosure. It is very true, that Lord Truro, in the case of *Owen v. Homan*, lays down the doctrine differently, for he says: ‘The cases which are reported have occasionally arisen out of transactions in which there have been personal communications;’ and he says, ‘the clear principle derived from those decisions is, that the creditor must make a full, fair, and honest communication of every circumstance calculated to influence the decision of the surety in entering into an obligation.’ He says: ‘He thinks the same principle is applicable to the case of sureties, and that when a communication does take place between the creditor and the surety, the duty of the creditor cannot be better illustrated than by the case of an assured.’ We, however, think that was laid down without sufficiently adverting to the fact of the decision in the previous case cited by the court, of *Hamilton v. Watson*; in which case, certainly, a different doctrine was laid down and decided by all the law lords who were then present, Lords Cottenham, Brougham, and Campbell. We think this doctrine is applicable to the guarantee in question. The non-disclosure of the circumstance of the change of security, even if it had been material, would not have vitiated the guaranty, unless it had been fraudulently kept back; and there was no ground to impute fraud, in fact, to the plaintiffs, or their agent. They might well have supposed that the desire of J. Brancker to get rid of his own guaranty did not indicate any bad opinion of his brother’s circumstances or character, but arose from a wish on other grounds to contract his liability. I may add, that the jury having actually found that the circumstance was, in itself, a matter wholly immaterial, whatever was stated by the witness to be his own view of the subject, it is hardly open to us now to consider; it was a matter of fact. For these reasons, the rule, in our judgment, must be refused.” See, also, Leith Banking Co. *v. Bell*, 8 Shaw & Dunl. R. 721; s. c. 5 Wils. & Sh. R. 703; *Evans v. Keeland*, 9 Ala. R. 42. And see *Moens v. Heyworth*, 10 Mees. & Welsb. R. 147; and *Taylor v. Ashton*, 11 Ibid. 401.

person should conceal a material fact, although there were no fraudulent intention, there would evidently be a breach of implied trust, and as both would have been in fault, they should bear the loss. It would seem, also, that facts concealed should be so material that, had they been known to the guarantor, he would not have assumed the guaranty; and should also have been specially within the knowledge of the parties concealing them,—for if they be not vital to the undertaking, or if they be matters of individual supposition, general opinion, or public reputation, in relation to which the guarantor had ample means to inform himself with proper diligence, the concealment of them would afford no good ground to set aside the contract.<sup>1</sup>

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<sup>1</sup> This was the ground upon which the case of *Hamilton v. Watson*, 12 Clark & Finnel. R. 119 was decided. No fraud was alleged, but simply a concealment of material facts, and the ground of the decision was, that the facts concealed were not material. The Lord Advocate and Solicitor-general said: “The principle of law is not disputed here; but its applicability to the present case. In all the cases cited there was a concealment of something which affected the very nature of the contract entered into by the surety.” . . . . “Admitting to the fullest extent the authority of these cases, (*Pidcock v. Bishop, Smith v. Bank of Scotland, Leith Banking Co. v. Bell,*) it is submitted that they do not apply to the present. The only fact that the bankers here could communicate was that Elles was not able at the moment to pay his own debts, and could not get money except through the credit of a third person. But that fact was evident from the circumstance of his requiring a surety; for had he been in flourishing circumstances, there would have been no need of a surety to obtain him a credit. The argument on the other side cannot be maintained without the appellant going the length of contending that the surety is entitled to know the specific use to which the money raised on his credit is to be applied. Information to that extent would in most cases be impossible; and if any necessity to impart it could be imposed on bankers they must altogether refuse cash credits to any of their customers.” This view was completely sustained by the court, and was the ground of the decision. The Lord Chancellor said: “I have already stated during the argument that I considered that there was no averment of any agreement as to the mode in which the money was intended to be applied.” “The mere circumstance of the parties supposing that the money was intended to be applied to a particular purpose, and the fact that it was intended to be so applied do not appear to me to vitiate the transaction at all.” Lord Campbell said: “The question is, what, upon entering into such a contract, ought to be dis-

§ 869. There is, however, one exception to this rule, that the discharge of the principal is a discharge of the surety, which obtains when the discharge arises from causes which

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closed ? and I will venture to say, if your lordships were to adopt the principles laid down, and contended for by the appellant's counsel here, that you would entirely knock up those transactions in Scotland of giving security upon a cash account, because no bankers would rest satisfied that they had a security for the advance they made, if, as it is contended, it is essentially necessary that every thing should be disclosed by the creditor that is material for the surety to know. If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given, to state how the account has been kept: whether the debtor was in the habit of overdrawing; whether he was punctual in his dealings; whether he performed his promises in an honorable manner; — for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure; and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is any thing that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires. Now, in this case, assuming that there had been the contract contended for, and that that had been concealed, that would have vitiated the suretyship. There is no proof, nor is there any allegation that there was any such contract. There is, therefore, neither allegation nor proof, and what then does the case rest upon ? It rests merely upon this, that at most there was a concealment by the bankers of the former debt, and of their expectation, that if this new surety was given, it was probable that that debt would be paid off. It rests merely upon non-disclosure or concealment of a probable expectation. And if you were to say that such a concealment would vitiate the suretyship given on that account, your lordships would utterly destroy that most beneficial mode of dealing with accounts in Scotland." This opinion by Lord Campbell if taken together with that delivered by him the previous year in the case of *Railton v. Matthews*, 10 Clark & Finnel. R. 939, (see supra,) seems clearly to indicate the rule of the text to be that adopted by him. See, also, *Evans v. Keeland*, 9 Ala. R. 42.

originate with the law, and therefore alter the contract, with the implied consent of the guaranteee. Thus, where a surety claimed relief, on the ground that the defendants, who were creditors, signed the certificate in bankruptcy of the principal debtor, after the plaintiff had given them notice not to do so; it was deemed to be no ground for discharging the surety.<sup>1</sup>

§ 870. The liability of a surety cannot, however, be extended beyond the actual terms of his engagement. Whenever, therefore, he fairly assumes a liability, it may be extinguished by any act or omission of the guaranteee, which alters the terms of the contract, unless it be with his consent. Nor does it matter, that such an alteration be for the benefit of the guarantor; because he has a right to stand upon the very terms of his agreement.<sup>2</sup> So, also, inasmuch as the contract of the guarantor and surety is dependent upon that of the principal debtor, the discharge or release of such principal discharges the surety also. Thus, if the creditor, without the consent of the guarantor, agree to give time to the principal debtor;<sup>3</sup> or make an arrangement with him, altering the terms of the contract;<sup>4</sup>

<sup>1</sup> Browne *v.* Carr, 7 Bing. R. 508; s. c. 2 Russ. R. 600; Langdale *v.* Parry, 2 Dowl. & Ry. R. 337.

<sup>2</sup> Miller *v.* Stewart, 9 Wheat. R. 680; Wright *v.* Johnson, 8 Wend. R. 512; Bank of Washington *v.* Barrington, 2 Penn. R. 27; Sasser *v.* Young, 6 Gill & Johns. R. 243; Rathbone *v.* Warren, 10 Johns. R. 587; Bacon *v.* Chesney, 1 Stark. R. 192; Bonar *v.* Macdonald, 1 Eng. Law & Eq. R. 1.

<sup>3</sup> Browne *v.* Carr, 7 Bing. R. 508; s. c. 2 Russ. R. 600; Nisbet *v.* Smith, 2 Bro. Ch. R. 579; Bank of Ireland *v.* Beresford, 6 Dow, R. 233; Rees *v.* Barrington, 2 Ves. jr. R. 540; Peake *v.* Dorwin, 25 Verm. R. 28. But see the late case of Owen *v.* Ilomans, 25 Eng. Law & Eq. R. 1, 12, where the contrary rule is laid down, reversing the judgment of Lord Truro in the same case. 3 Eng. Law & Eq. R. 112.

<sup>4</sup> Eyre *v.* Barthrop, 3 Madd. R. 221; Lopez *v.* De Tastet, 8 Taunt. R. 712; Bowmaker *v.* Moore, 3 Price, R. 214; Archer *v.* Hale, 1 Moore & P. R. 285; s. c. 4 Bing. R. 464; Hallett *v.* Mount Stephen, 2 Dow. & Ry. R. 343; Whitcher *v.* Hall, 5 B. & C. R. 269; s. c. 8 Dow. & Ry. R. 22. See Bamford *v.* Iles, 3 Exch. R. 380; Frank *v.* Edwards, 16 Eng. Law & Eq. R. 477,

or covenant not to sue him;<sup>1</sup> or agree to release him;<sup>2</sup> or accept a composition from him;<sup>3</sup> he loses his claim upon the guarantor. But if the guarantee merely take a new or additional security from the debtor, without agreeing to give him time, it will not discharge the surety; because it is very manifest, that this will not alter the actual contract, to the possible injury of the guarantor.<sup>4</sup>

• • • § 871. If there be any condition in the terms of the guaranty precedent to the liability of the guaranteee, it must be strictly complied with, or the guarantor will be discharged.<sup>5</sup> Thus, if it be necessary to make a demand upon the surety, he will not be liable until it is made;<sup>6</sup> and if no time be stated within which it must be made, it must be made within a reasonable time. Thus, where, by the terms of a guaranty, the guarantors agreed "to indorse any bill or bills which Mr. J. S. may give to Messrs. P. & Co., and Messrs. P. & Co. to allow £5 per cent. on the amount of the said bills for the said guaranty," and certain bills were given by J. S. to P. & Co., which they held in their hands for seventeen months and ten days, without requesting an indorsement from the guarantors, and at the end of that time J. S. became a bankrupt; it was held, that the guarantors were not bound; and Bayley, J.

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and Bennett's note; Mayor, &c. v. Oswald, Id. R. 236; North-western Railway Co. v. Whinray, 26 Eng. Law & Eq. R. 488; Stewart v. McLean, 29 Id. R. 383.

<sup>1</sup> Dean v. Newhall, 8 T. R. 168; Hutton v. Eyre, 6 Taunt. R. 289; Theobald on Princ. and Surety, 165.

<sup>2</sup> Hawkshaw v. Parkins, 2 Swanst. R. 539; Theobald on Princ. and Surety, 115.

<sup>3</sup> Lewis v. Jones, 4 B. & C. R. 506.

<sup>4</sup> Twopenny v. Young, 5 Dow. & Ry. R. 259; s. c. 3 B. & C. R. 208; Emes v. Widdowson, 4 Car. & Payne, R. 151.

<sup>5</sup> Antrobus v. Davidson, 3 Meriv. R. 569; Elworthy v. Maunder, 2 Moore & Payne, R. 482; Pearse v. Morrice, 2 Ad. & Ell. R. 84; Musket v. Rogers, 5 Bing. N. C. R. 729; Hunt v. Smith, 17 Wend. R. 179.

<sup>6</sup> Alcock v. Blowfield, Noy, R. 95; Russell v. Buck, 11 Verm. R. 166.

said,—“the guaranty gives the plaintiff an option to have the indorsement or not; but it provides that they are not to pay the commission, unless they do have the indorsement. Then the option ought to have been made in a reasonable time, and at any rate before that event occurred, of which, if the defendants had known, they would never have signed the guaranty.”<sup>1</sup>

§ 871 *a.* There is one condition always implied in the contract of the guarantee,—that he will use all means in his power, which are reasonable and proper, to compel payment from the principal; and in an action upon a guaranty, he is always bound clearly to show that he has done his duty in this respect, or that it was useless.<sup>2</sup> Where, therefore, a guaranty was made in these words, “April 10, 1834—I warrant the within note good and collectable until the first day of July, 1834,” the guarantee was held to be bound to show that he had done all that was diligent and proper in endeavoring to collect the note, and to show that the maker had not paid it, or was insolvent.<sup>3</sup> So, also, where a note, payable on demand, was guaranteed, and it appeared that the maker continued solvent for two years, during which time no attempt was made to collect it, the guarantor was held to be discharged.<sup>4</sup> And where a promissory note or bill of exchange is guaranteed, the guarantee must always show a demand and a notice of dishonor to all proper parties; and generally to the guarantor, although his name be not in the bill or note.<sup>5</sup> But the same promptness in making a demand and notice is not necessary

<sup>1</sup> Payne *v.* Ives, 3 Dowl. & Ryl. R. 664.

<sup>2</sup> Ward *v.* Fryer, 19 Wend. R. 494; Sylvester *v.* Downer, 18 Vermont, (3 Washburn,) R. 32.

<sup>3</sup> Wheeler *v.* Lewis, 11 Verm. R. 265; Loveland *v.* Shepard, 2 Hill, R. 139; Beach *v.* Bates, 12 Verm. R. 68.

<sup>4</sup> Gamage *v.* Hutchins, 23 Maine, R. 565; Williams *v.* Collins, 2 Murphy, R. 47; Globe Bank *v.* Small, 25 Maine, (12 Shepley,) R. 366; Clark *v.* Remington, 11 Metcalf, R. 563.

<sup>5</sup> Foote *v.* Brown, 2 McLean, R. 369; Hank *v.* Crittenden, 2 McLean, R. 557; Lewis *v.* Brewster, 2 McLean, R. 21.

to charge a guarantor on a bill or note as to charge an indorser, and the guarantor must prove that he has suffered damage by the neglect to make a demand on the maker and to give notice, and then he is only discharged to the extent of the damage sustained.<sup>1</sup> And if the principal be insolvent at the

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<sup>1</sup> Rhett *v.* Poe, 2 Howard, S. C. R. 484. Mr. Justice Daniel in this case says, "It is contended that a guaranty is an insurance of the punctual payment of the paper guaranteed; is a condition and a material consideration on which this paper is received; and, therefore, that a failure in punctual payment at maturity is a forfeiture of such insurance on condition, rendering the obligation of the guarantor absolute from the period of the failure. Whether this proposition can or cannot be maintained to the extent here stated, the authorities concur in making a distinction between actions upon a bill or note, and actions against a party who has guaranteed such bill or note by a separate contract. In the former instances, notice in order to charge the drawer or indorser is, with very few established exceptions, uniformly required; in the latter, the obligation to give notice is much more relaxed, and its omission does not imply injury as a matter of course. In Warrington *v.* Furber, 8 East, R. 242, where the guaranty was not by indorsement of the paper sued upon, and the action was upon the contract, Lord Ellenborough said, that 'the same strictness of proof is not necessary to charge the guarantees as would have been necessary to support an action on the bill itself, where, by the law-merchant, a demand and a refusal by the acceptor ought to be proved, to charge any other party on the bill, and this notwithstanding his bankruptcy. But this is not necessary to charge guarantees who insure as it were the solvency of the principal; and if he becomes bankrupt and notoriously insolvent, it is the same thing as if he were dead; and it is nugatory to go through the ceremony of making a demand upon him.' Le Blanc, Justice, says, in the same case, 'there is no need of the same proof to charge a guarantee as there is a party whose name is on a bill of exchange; for it is sufficient as against the former to show that the holder could not have obtained the money by making demand of it.' The same doctrine may be found in Phillips *v.* Astling et al., 2 Taunt. R. 206. So, too, Lord Eldon, in the case of Wright *v.* Simpson, 6 Ves. R. 734, expresses himself in terms which show his clear understanding of the position of a collateral guaranty or surety. His language is, 'As to the case of principal and surety, in general cases, I never understood that, as between the obligee and the surety, there was an obligation to active diligence against the principal; but the surety is a guaranty, and it is his business to see whether the principal pays, and not that of the creditor.' The case of Gibbs *v.* Cannon, 9 Serg. & Rawle, R. 198, was an action against a guarantor who was not a party on the note, upon his separate contract. The

time the debt becomes due, demand and notice are not necessary.<sup>1</sup>

§ 872. The guarantee is, also, bound to exercise proper diligence, and to perform all the duties incumbent upon him;

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Supreme Court of Pennsylvania decided in this case, that, provided the drawer and indorser of the note were solvent at the maturity of the note, notice of non-payment should be given to the guarantor; and that the latter, under such circumstances, may avail himself of the want of notice of non-payment; but it places the burden of proving solvency, and of injury flowing from want of notice, upon the guarantor. The last case mentioned on this point, and one which seems to be conclusive upon it, is that of *Reynolds v. Douglass et al.*, 12 Peters, R. 497, in which the court established these propositions:—

“ 1st. That the guarantor of a promissory note, whose name does not appear upon the note, is bound without notice, where the maker of the note was insolvent at its maturity, unless he can show that he has sustained some prejudice by want of notice of a demand on the maker, and of notice of non-payment.

“ 2d. If the guarantor can prove he has suffered damage by the neglect to make the demand on the maker, and to give notice, he can be discharged only to the extent of the damage sustained. Tried by the principles ruled in the authorities above cited, and especially by that from this court, in 12 Peters, it would seem that this case should admit of neither doubt nor hesitancy. The note on which the action was brought was given as a guaranty for the payment of the bill for \$8,000, as is proved, and indeed admitted on all hands. It is the distinct and substantive agreement by which the guaranty of the bill was undertaken. It is established by various and uncontradicted circumstances in the case, and finally by the solemn admissions of Timberlake, the drawer, and Smith, the acceptor of the bill, both of whom have testified in the cause, that at the maturity of the bill they were both utterly insolvent; that Timberlake was probably so before the commencement of these transactions; and that Smith, before the maturity of the bill, had made an assignment of every thing he had claim to, for the benefit of others, and, amongst the creditors named in that assignment, providing for the plaintiff in error as ranking high amongst the preferred class.

“ Under such circumstances, to have required notice of the dishonor of the bill would have been a vain and unreasonable act, such as the law cannot be presumed to exact of any person.” See, also, *Talbot v. Gay*, 18 Pick. R. 534; *Dole v. Young*, 24 Pick. R. 250; *Wildes v. Savage*, 1 Story, R. 22.

<sup>1</sup> *Ibid.* *Lewis v. Brewster*, 2 McLean, R. 21; *Skofield v. Haley*, 9 Shepley, R. 164.

and if, in consequence of his neglect, any injury accrue to the guarantor, he will thereby be discharged *pro tanto*.<sup>1</sup> If, therefore, the guarantee surrender or lose securities or funds, which might be applied by him in discharge or in reduction of his demand against the principal, the guarantor is only liable so far as he would have been, had the guarantee performed all his duty. The principle in these cases is, that the guaranteee is the trustee or agent of the guarantor, and is bound, therefore, either to hold all securities in behalf of the guarantor, or to apply them properly. Nor does it matter, whether the guarantor knew of the existence of particular securities, which the guarantee held against the principal creditors: in all cases he is entitled to the benefit thereof.<sup>2</sup> Thus, where a debt was secured by two promissory notes, given by two sureties, each for half of the amount of the debt, and also, by a warrant of attorney of the principal debtor, upon which the creditor had entered up judgment, and taken the goods of the debtor in execution, and afterwards withdrew the execution; it was held, that the sureties were *pro tanto* discharged.<sup>3</sup> If the liability of the surety depend upon any prior act of the creditor, as to make a demand upon the surety, his omission to make it is a discharge of the surety. If no time be mentioned within which a demand must be made, it must be made within reasonable time.<sup>4</sup>

§ 873. Want of proper notice to the guarantor will, also, discharge him from liability. Where the guaranty is to apply to future transactions, and requires an acceptance on the part

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<sup>1</sup> Capel *v.* Butler, 2 Sim. & Stu. R. 457; Oxley *v.* Young, 2 H. B. R. 613; Wheeler *v.* Lewis, 11 Vermont R. 265; Russell *v.* Buck, 14 Vermont R. 147; Sigourney *v.* Wetherell, 6 Metcalf, R. 553.

<sup>2</sup> Mayhew *v.* Crickett, 2 Swanst. R. 185; Law *v.* East Ins. Co. 4 Ves. R. 824; Story, Eq. Jurisp. § 215, 303.

<sup>3</sup> Mayhew *v.* Crickett, 2 Swanst. R. 185.

<sup>4</sup> Payne *v.* Ives, 3 Dowl. & Ry. R. 664; Oxley *v.* Young, 2 H. B. R. 613; Theobald on Principal and Surety, 139.

of the guarantee, the guaranteee is bound to give notice to the guarantor of his acceptance thereof, in order to bind him. For the party, giving a letter of guaranty has a right to know, whether the person to whom it is addressed, means to hold him ultimately responsible; inasmuch as his own caution and vigilance, may, in a great measure, be regulated by his knowledge of the fact.<sup>1</sup> After such a guaranty is accepted, it is not, ordinarily, necessary for the guaranteee to give notice to the guarantor of the advances, acceptances, or indorsements, made under it, until a reasonable time after the default of the principal. It may be otherwise in some particular cases; as where advances are contemplated upon certain future contingencies, the occurrence of which is doubtful, when it is proper to give notice, within a reasonable time, that the advances are actually made, in order to give the guarantor information, that the contingencies have actually happened, and that the guaranty has been acted upon.<sup>2</sup> But, if the guaranty be either continuing, or limited to a single transaction, in the absence of peculiar circumstances, it is only incumbent upon the guaranteee, after giving due notice of his acceptance of the guaranty, to make the proper demand upon the debtor, when the credit has expired, or the amount become due, and, upon his default, to give notice thereof to the guarantor, within a reasonable time afterwards.<sup>3</sup> What is a reasonable time to give notice of the amount of the advances, or of the default of the principal, depends upon the circumstances of each case, and is mainly governed by the consideration, whether the

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<sup>1</sup> Douglass *v.* Reynolds, 7 Peters, R. 113; Edmondston *v.* Drake, 5 Peters, R. 624; Lee *v.* Dick, 10 Peters, R. 482; Reynolds *v.* Douglass, 12 Peters, R. 497; Wildes *v.* Savage, 1 Story, R. 32; Oaks *v.* Weller, 13 Verm. R. 106; Howe *v.* Nickels, 22 Maine R. 175; Lawson *v.* Townes, 2 Alab. R. 373; Mussey *v.* Rayner, 22 Pick. R. 223; Williams *v.* Staton, 5 Smedes & Marsh. R. 347; Kay *v.* Allen, 9 Barr, R. 320.

<sup>2</sup> Wildes *v.* Savage, 1 Story, R. 32; Douglass *v.* Reynolds, 7 Peters, R. 113; Cremer *v.* Higginson, 1 Mason, R. 323; Howe *v.* Nickels, 22 Maine R. 175; Mussey *v.* Rayner, 22 Pick. R. 223.

<sup>3</sup> Ibid.; Whiton *v.* Mears, 11 Metcalf, R. 563.

want of such notice, at an earlier period, has been to the prejudice of the guarantor; if it have, then to the extent of that prejudice, he will be discharged; but want of notice will not discharge the guarantor, beyond the loss or injury actually sustained by him, in consequence of the neglect or omission.<sup>1</sup> The only notice, to which the guarantor has a strict right, is notice, that his proposal of guaranty is accepted, and will be acted upon; and this right may be waived by the form of the guaranty;<sup>2</sup> or by the manifest intention of the parties, as implied thereby.<sup>3</sup> As, if a promissory note be guarantied upon its face, or by indorsement, no notice need be given by any person, to whom it is transferred, that he holds the guarantor responsible; because the terms of the contract manifestly indicate such an intention. So where a guaranty was in these terms: "If you will let A. have \$100 worth of goods on three months' notice, you may consider me as guaranteeing the same,"<sup>4</sup>—it was held, that a notice of acceptance was not necessary, the terms of the guaranty indicated a waiver

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<sup>1</sup> *Goring v. Edmonds*, 6 Bing. R. 99; *Trent Navigation Co. v. Harley*, 10 East, R. 34; *Theobald on Principal and Surety*, 137; *Orme v. Young, Holt, N. P. C. R. 84*; *Wildes v. Savage*, 1 Story, R. 35; *Eyre v. Everett*, 2 Russ. R. 381; *Reynolds v. Douglass*, 12 Peters, R. 497; *Oxford Bank v. Haynes*, 8 Pick. R. 423; *Pitman on Principal and Surety*, 197; *Peel v. Tatlock*, 1 Bos. & Pul. R. 419; *Lilley v. Hewitt*, 11 Price, R. 494; *McCalmont v. Lawrence*, 2 How. S. C. R. 426; *Howe v. Nickels*, 22 Maine R. 175; *Train v. Jones*, 11 Verm. R. 444. The Supreme Court of Massachusetts have, however, decided, that a guaranteee is bound to give notice to the guarantor of the default of the principal, and to make demand of the sum claimed, and that the bringing of an action is not a sufficient demand. *Courtis v. Dennis*, 7 Metcalf, R. 510. See, also, *Clark v. Remington*, 11 Metcalf, R. 361. This, however, seems to be at variance with the whole current of authority, and is expressly negatived in *Wildes v. Savage*, 1 Story, R. 35. See, also, *Langdale v. Parry*, 2 Dowl. & Ryl. R. 337; *London Ass. Co. v. Buckle*, 4 J. B. Moore, R. 153.

<sup>2</sup> *New Haven County Bank v. Mitchell*, 15 Conn. R. 206; *Wildes v. Savage*, 1 Story, R. 22.

<sup>3</sup> *Smith v. Dunn*, 6 Hill, R. 543.

<sup>4</sup> *Whitney v. Groot*, 24 Wend. R. 82.

thereof.<sup>1</sup> Want of notice will, in no other case, absolutely discharge the guarantor; although, if any loss be thereby occasioned to him, it will be deducted from his original liability, *pro tanto*. Thus, if the debtor be solvent, when the debt becomes due, and, subsequently, before notice of his default be given to the guarantor, he become insolvent, the surety is discharged, because of the entire loss of a claim, which he might have enforced, if he had received due notice. The rights of a guarantor, after his guaranty is accepted, in respect to notice, are widely different from those of an indorser. In the latter case, strict notice is a condition precedent to liability; but, in the former, notice is only necessary, when want of it operates as an injury.<sup>2</sup>

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<sup>1</sup> In *Smith v. Dunn*, 6 Hill, R. 543, a broader doctrine is laid down as obtaining in New York, but it is not supported by the other authorities out of the State. In that case the guaranty was in these terms: "We consider J. E. V. good for all he may want of you, and we will indemnify the same," and it was held that notice of acceptance was unnecessary. Mr. Justice Bronson says, "The defendant invited the plaintiffs to sell goods to Steel & Wall, on his promise to guarantee the payment of the debt. The plaintiffs assented, and delivered the goods. The proposition of one party was accepted by the other; and according to our notions of the law this made a complete contract. Nothing further was necessary to its consummation. If the defendant wanted notice, and did not get it from the persons whom he thought worthy of credit, it was his business to inquire and ascertain what had been done. There is nothing in the defendant's undertaking which looks like a condition, or even a request, that the plaintiffs should give him notice if they acted upon the guaranty; and there is no principle upon which we can hold that notice was an essential element of the contract. *Whitney v. Groot*, 24 Wend. R. 82; *Douglass v. Howland*, Ib. 35. The case of *Beekman v. Hale*, 17 Johns. R. 134, and *Stafford v. Low*, 16 Ib. 67, went upon the ground that there was nothing more than an overture or proposition leading to a guaranty. But here the undertaking was absolute. The defendant said to the plaintiffs, in substance, 'If you deliver the goods, I will guarantee the payment.' We cannot add a condition that the defendant shall have notice. He should have provided for that himself in the proposal made to the plaintiffs. I know there are cases which require notice; but we think they are not based upon the common law, and for that reason they have not been followed in this State."

<sup>2</sup> *Wildes v. Savage*, 1 Story, R. 25; *Dole v. Young*, 24 Pick. R. 250; *Mus-*

§ 874. A mere forbearance or omission to sue by the creditor will not discharge the guarantee unless he be under some obligation to sue; and unless his forbearance would prejudice the claim of the guarantee upon the principal, and thereby injure him.<sup>1</sup> So, also, an omission to make a proper presentment for payment to the principal will not discharge the guarantor, unless presentment be a condition precedent, as in the case of a promissory note or bill of exchange; or unless the guarantor sustain some damage in consequence of non-presentment; in which case, his liability will be thereby reduced *pro tanto*.<sup>2</sup> If, indeed, the principal be insolvent, when the debt on which the guaranty is given, becomes due, no demand need be made on the principal, in order to bind the guarantor, upon the presumption that, in such a case, no injury could be done to the guarantor by want of notice;<sup>3</sup> yet, if any injury be thereby occasioned, the guarantor is responsible therefor.

§ 874 a. Where a guarantee has been guilty of such *laches* as to deprive him of any legal claim in respect of the guaranty, the guarantor may, nevertheless, by waiving those *laches*, render himself responsible. And such a waiver may arise by implication; as if a guarantor of a promissory note pay interest thereon to the guarantee, after knowledge of such *laches* on the part of the latter, which would have destroyed his legal claim; for such an act would be a recognition of a

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sey *v.* Rayner, 22 Pick. R. 223; Reynolds *v.* Douglass, 12 Peters, R. 497; 3 Kent's Comm. p. 123; Thrasher *v.* Ely, 2 Smedes & Marshall's R. 139.

<sup>1</sup> Eyre *v.* Everett, 2 Russ. R. 381; Orme *v.* Young, Holt, N. P. C. 84; Goring *v.* Edmonds, 6 Bing. R. 94; s. c. 3 M. & P. R. 259; Locke *v.* U. S. 3 Mason, R. 446; Oxford Bank *v.* Lewis, 8 Pick. R. 458; Blackstone Bank *v.* Hill, 10 Pick. R. 129; Sprigg *v.* Mount Pleasant Bank, 14 Peters, R. 204; McDoal *v.* Yeomans, 8 Watts, R. 361.

<sup>2</sup> Van Wart *v.* Wooley, 3 Barn. & Cres. R. 439; Holbrow *v.* Wilkins, 1 Barn. & Cres. R. 10; Gibbs *v.* Cannon, 9 Serg. & Rawle, R. 202; Oxford Bank *v.* Haynes, 8 Pick. R. 423.

<sup>3</sup> Wildes *v.* Savage, 1 Story, R. 22; Reynolds *v.* Douglass, 12 Peters, R. 497; Beebe *v.* Dudley, 6 Foster, R. 249.

still existing right in guarantee, at variance with any other supposition than that of a waiver.<sup>1</sup> But in case a waiver is relied upon by the guaranteee, he must prove it.<sup>2</sup>

§ 875. The obligation of the surety or guarantor may also be extinguished by the statute of limitations,<sup>3</sup> when it arises by simple contract. The statute requires, that the actions mentioned therein, among which is the action upon the contract of guaranty, must be brought within six years next after the cause of action arises. The time from which the statute begins to run, is, however, to be reckoned, not from the date of the contract, but from the time when the obligation becomes absolute, so that it can be sued; as when a note or bill becomes due, or when the principal makes default in a case of guaranty. A payment on account by the principal within six years, would not, however, deprive the guaranteee of the benefit of the statute,<sup>4</sup> although an acknowledgment, either verbal or in writing, by the guaranteee, within six years, would deprive him of the benefit of the statute.<sup>5</sup>

§ 876. In cases of specialties, where the statute does not apply, mere lapse of time can be used only as evidence of payment, to be credited or not, according to the circumstances of the case. But, where the statute applies, the lapse of the time, designated therein, operates as a conclusive bar.<sup>6</sup>

§ 877. A guarantor cannot discharge himself from liability

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<sup>1</sup> *Sigourney v. Wetherell*, 6 Metcalf, R. 553.

<sup>2</sup> *Gamage v. Hutchins*, 10 Shepley, R. 565.

<sup>3</sup> 21 Jac. 1, c. 16. See Post, *Statute of Limitations*.

<sup>4</sup> *Theobald on Principal and Surety*, 110, 111; *Burleigh v. Stott*, 2 Man. & Ry. R. 93; s. c. 8 Barn. & Cres. R. 36; *Slater v. Lawson*, 1 B. & Adolph. R. 396; *Atkins v. Tredgold*, 3 Dow. & Ry. R. 200; s. c. 2 B. & C. R. 23.

<sup>5</sup> *Gibbons v. M'Casland*, 1 B. & Ald. R. 690.

<sup>6</sup> *Mayor of Kingston v. Horner*, Cowp. R. 102; *Oswald v. Leigh*, 1 T. R. 270.

by giving notice to the guarantee, that he will not be bound any farther, unless there be some special agreement to that effect in the original instrument,<sup>1</sup> or unless there be fraud on the part of the guarantee.<sup>2</sup>

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<sup>1</sup> *Calvert v. Gordon*, 3 Man. & Ry. R. 124; s. c. 7 B. & C. R. 809, 4 Russ. R. 581; 1 M. & Ry. R. 497; *Loveland v. Knight*, 3 Car. & Payne, N. P. C. 106.

<sup>2</sup> *Shepherd v. Beecher*, 2 P. W. R. 288.

## CHAPTER XXVIII.

## OF THE APPROPRIATION OF PAYMENTS.

§ 878. THE general rule, in regard to the appropriation of payments on account, is that the party, who pays money, has a right to apply the payment, as he sees fit; if there be several debts due from him, he can designate that one to which it shall be applied. If the party making the payment do not, at the same time, make any specific appropriation thereof, then the party, to whom the payment is made, may apply it as he pleases. If neither party make any specific application of the payments to the discharge of any particular debt, the presumption is, that the first items of a running account, or that the debts, which are first in point of time, are to be thereby discharged. In all cases, if the parties themselves have omitted to make any specific appropriation of payments, the law will appropriate them according to the justice and equity of the case, for the benefit of both parties.<sup>1</sup> This general rule

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<sup>1</sup> Cremer *v.* Higginson, 1 Mason, R. 338; United States *v.* Wardwell, 5 Mason, R. 85; Pattison *v.* Hull, 9 Cow. R. 747; Baker *v.* Stackpoole, 9 Cow. R. 420; Seymour *v.* Van Slyck, 8 Wend. R. 403; Niagara Bank *v.* Roosevelt, 9 Cow. R. 409; Mitchell *v.* Dall, 4 Gill & John. R. 361; Reed *v.* Boardman, 20 Pick. R. 446; Gass *v.* Stinson, 3 Sumner's Reports, 98; U. States *v.* Eckford's Ex'rs, 17 Peters, R. 251; s. c. 1 Howard, R. 250; Copland *v.* Toulmin, 7 Clark & Finnell. R. 350; U. S. *v.* Kirkpatrick, 9 Wheat. R. 720; Gordon *v.* Hobart, 2 Story, R. 264. In this case Mr. Justice Story says: "What under such circumstances, is the rule promulgated both by courts of law and courts of equity? It is, that, where money is paid by, or received for, a debtor,

applies equally in favor of sureties and guarantors; and any appropriation made by the party, entitled at the time to make such appropriation, is binding upon all parties.<sup>1</sup>

§ 879. In cases where there are running accounts between the parties, however, there being various items of debt on the one side and of credit on the other, occurring at different times, the rule obtains, that where payments are made without special appropriation by either party, they are to be applied to the discharge of the separate items in the order of time in which they stand in the account,— the earliest item of debt being first extinguished, and so on until the whole account of debt is cancelled; unless, indeed, in the absence of any such appropriations, a different application growing out of the relations of the parties and the nature of the account or transactions between them, is required in order to do justice.<sup>2</sup> But if there be no running accounts between the parties, and the debtor make no special appropriation of the payments, the creditor may apply it to the extinguishment of any debt that he pleases.<sup>3</sup>

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by his creditor, the debtor has a right to make the appropriation to what purpose he pleases. If the debtor makes no appropriation, then, the creditor may apply it to the satisfaction of any demand, which he has against his debtor at his own pleasure. If neither party make any such application, then, if there are various debts due to the creditor, the court will make the application according to its own view of the law and equity of the law, under all the circumstances."

<sup>1</sup> Theobald on Principal and Surety, p. 221, § 239; *Shaw v. Picton*, 4 B. & C. R. 715; s. c. 7 Dowl. & Ry. R. 201; *Dunn v. Slee*, Holt, R. 399; *Devaynes v. Noble*, 1 Meriv. R. 585; *Plomer v. Long*, 1 Stark. N. P. C. R. 153; 1 Story, Eq. Jurisp. § 459 *a* to § 459 *g*, 3d edit., where the whole matter is elaborately discussed and all the cases cited; *Gass v. Stinson*, 3 Sumner, R. 98; *Brooke v. Enderby*, 2 Brod. & Bing. R. 70; *Lysaght v. Walker*, 5 Bligh, R. (n. s.) 28; *Bosanquet v. Wray*, 6 Taunt. R. 597; *Bank of Scotland v. Christie*, 8 Clark & Finnell. R. 214, 227, 228; *Thompson v. Brown*, Mood. & Malk. R. 40. See post, § 980.

<sup>2</sup> *Upham v. Lefavour*, 11 Met. R. 184; *Wright v. Laing*, 3 Barn. & Cres. R. 165; *Peters v. Anderson*, 5 Taunt. R. 596. See post, § 980.

<sup>3</sup> See 1 Story, Eq. Jurisp. § 459 *a*; *Lysaght v. Walker*, 5 Bligh, (n. s.) R.

§ 880. The creditor is not, however, bound to make an immediate decision as to the particular debts or accounts, to which he will appropriate payments, where there are several debts or accounts, or where there is a running account; but he will be allowed a reasonable time to decide, to which account or debt he will place it. When once he has made his election, however, he is bound thereby. The difficulty in each case is, to decide whether such an application has actually been made, which is matter of mere evidence, depending upon the circumstances of the particular case.<sup>1</sup> It has been held, that his entry of payments upon one account does not preclude him from applying them subsequently, within a reasonable time, to any other account to which he might originally have applied them, provided that such entry has not been communicated to the party making the payment. This decision was made upon the ground, that the fact of the creditors making private entries in their books, which were not communicated to the other party, did not indicate a complete election so to appropriate the payments, but only an idea of so appropriating them.<sup>2</sup>

§ 880a. But this right of appropriation is one strictly existing between the original parties; and no third person has any authority to insist upon an appropriation of such money in his own favor, where neither the creditor nor the debtor have made or required any such appropriation.<sup>3</sup>

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28; *Bosanquet v. Wray*, 6 *Taunt. R.* 597; *Brooke v. Enderby*, 2 *Brod. & Bing. R.* 70; *Upham v. Lefavour*, 11 *Metcalf, R.* 184.

<sup>1</sup> *Simson v. Ingham*, 2 *D. & C. R.* 65; *s. c.* 2 *D. & R. R.* 249; *Shaw v. Picton*, 4 *B. & C. R.* 715; *s. c.* 7 *Dowl. & Ry. R.* 201; *Dunn v. Slee, Holt*, *R.* 399; *Dows v. Morewood*, 10 *Barb. S. C. R.* 183; *Allen v. Culver*, 3 *Denio, R.* 293; *Seymour v. Van Slyck*, 8 *Wend. R.* 403.

<sup>2</sup> *Simson v. Ingham*, 2 *B. & C. R.* 65; *s. c.* 3 *D. & R. R.* 249.

<sup>3</sup> *Gordon v. Hobart*, 2 *Story, R.* 264, *per Mr. Justice Story*.

## CHAPTER XXIX.

## RIGHTS OF SURETY AND GUARANTOR.

§ 881. A SURETY or guarantor of a debt, may, if his character as such be apparent on the face of the instrument, upon which suit is brought, require the creditor to proceed against the principal first, provided he offer to indemnify him in such proceedings and to pay any deficiency in the sum which he may recover.<sup>1</sup> And if a guaranty for the performance of a contract be made by a separate instrument, a joint action cannot be maintained against the principal and the guarantor.<sup>2</sup> The surety or guarantor, who has paid the debt of his principal, is entitled to a reimbursement therefor, and may bring an action of *indebitatus assumpsit*, unless he have taken a bond of indemnity; in which case, he must sue upon his bond.<sup>3</sup> Yet, if the payment, made by the guarantor or surety, be in respect to a claim known by him to be illegal, or void for fraud or immorality, he cannot recover the sum paid thereupon from the principal.<sup>4</sup> If a counter security be given by the principal to the surety, which becomes due before the original debt, the surety may enforce it forthwith, without waiting until the default in the original debt. Thus, if a bond

<sup>1</sup> In the matter of Samuel H. Babcock, 3 Story, R. 398.

<sup>2</sup> De Ridder v. Schermerhorn, 10 Barb. S. C. R. 641.

<sup>3</sup> Theobald on Principal and Surety, 228, § 247; Toussaint v. Martinnant, 2 T. R. 100; Crafts v. Tritton, 8 Taunt. R. 365; s. c. 2 J. B. Moore, R. 411.

<sup>4</sup> Bryant v. Christie, 1 Stark. N. P. C. R. 329.

be given by the principal to the surety or guarantor, he may sue upon it immediately upon breach of the condition.<sup>1</sup>

§ 882. So, also, the guarantor, who has paid the debt of his principal, stands in his place, and may avail himself of all the securities for the debt, held and acquired by him; as well as of all the right and remedies, which he would have there-upon.<sup>2</sup> If the surety be disabled from enforcing any securities for the debt, which the principal holds, and can enforce, the guarantee will be restrained by a court of equity from prosecuting his claim against the guarantor, until the principal has enforced such securities.<sup>3</sup> Thus, where A. was surety for the performance of a charter-party of a neutral ship, freighted to go to France, and the charter-party was broken in consequence of an embargo laid by the French government, for which the French government declared itself bound to indemnify the owners, who were principals; it was held, that the surety was not bound to pay, until the owners had an opportunity to prosecute their claim against the French government, they being alone capable of enforcing it.<sup>4</sup>

§ 883. So, also, if the creditor, with the consent of the surety, accept from the debtor a percentage or reduction of the debt guaranteed, the surety is entitled to a proportional reduction of his own liability.<sup>5</sup> Thus, if the debt be 1,000 dollars, and the amount guaranteed be 500 dollars, and the proportion accepted be fifty per cent. of the original debt, the

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<sup>1</sup> *Penny v. Foy*, 2 M. & R. R. 181; s. c. 8 B. & C. R. 11.

<sup>2</sup> *Craythorne v. Swinburne*, 14 Ves. R. 162; *Parsons v. Briddock*, 2 Vern. R. 608; *Wright v. Morley*, 11 Ves. R. 12; 1 Story, Eq. Juris. § 459 *a*, to § 459 *g*, § 499, 3d ed.; *Copis v. Middleton*, 1 Turn. & Russ. R. 224; *Hodgson v. Shaw*, 3 Mylne & Keen, R. 183; *Mathews v. Aiken*, 1 Comstock, R. 595.

<sup>3</sup> *Cottin v. Blane*, 2 Anst. R. 514; *Wright v. Nutt*, 3 Bro. C. C. R. 326; s. c. 1 II. B. R. 137; *Wright v. Simpson*, 6 Ves. R. 728.

<sup>4</sup> *Cottin v. Blane*, 2 Anst. R. 544.

<sup>5</sup> *Bardwell v. Lydall*, 7 Bing. R. 489.

surety is only liable to pay fifty per cent. of the amount of his guaranty. If the composition be made without the consent of the guarantor, he is discharged thereby. If, however, the claim to the entire debt against the principal be extinguished by operation of law, as when he goes into bankruptcy, the consent of the surety to his accepting a dividend upon his claim, is implied. Indeed, it becomes the duty of the guarantee, in case of the bankruptcy of the principal, to prove his debt and take the dividend.<sup>1</sup>

§ 884. If the guarantee, having authority to compromise his claim, make any secret or underhand arrangement with the principal, at variance with the terms of his contract, in order to secure to himself some private advantage, it is considered as a fraud upon the guarantor, which renders the whole transaction void.<sup>2</sup>

§ 885. If there be several co-guarantors, and one of them, on the default of the principal, pay the whole debt, or more than his proportion of it, he may recover for such excess above his proper share. It was formerly questioned whether, at law, where one surety or guarantor has paid the whole debt of the principal, he could claim contribution against his co-sureties or co-guarantors, unless there were some positive agreement to that effect. But it is now well established, that he may claim contribution in such cases, both in law and in equity.<sup>3</sup> Nor does it matter, in this respect, whether the sureties are jointly and severally bound, or only severally, nor whether they are bound by the same instrument or by different instruments,

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<sup>1</sup> *Ex parte Rushforth*, 10 Ves. R. 409; *Paley v. Field*, 12 Ves. R. 435.

<sup>2</sup> *Cecil v. Plaistow*, 1 Anst. R. 202; *Leicester v. Rose*, 4 East, R. 372; *Cockshott v. Bennett*, 2 T. R. 763.

<sup>3</sup> Story, Eq. Jurisp. § 495; *Batchelder v. Fish et al.* 17 Mass. R. 464; *Kemp v. Finden*, 12 Mees. & Welsb. R. 423; *Cowell v. Edwards*, 2 Bos. & Pul. R. 268; *Browne v. Lee*, 6 Barn. & Cres. R. 689; *Daveis v. Humphreys*, 6 Mees. & Welsb. R. 153.

nor whether they know of each other's engagements or not, provided their obligations be in respect of the identical debt.<sup>1</sup> This doctrine stands upon the equitable ground, that the payment of the same debt, by one surety, enures to the benefit of all. Where there are several sureties, each must contribute his equal proportion of the loss, if there be any.<sup>2</sup> But at law this share is to be calculated according to the whole number of sureties, whether solvent or insolvent, while in equity the shares are to be divided among the solvent parties only. If, therefore, there be three sureties, and one of them be insolvent, and a second pay the whole debt, at law he can only recover from the third his proportional share, that is, one third of the debt.<sup>3</sup> But in equity he would recover one moiety.<sup>4</sup> When a surety is reimbursed in part, either by the debtor or by a counter security, he must deduct such sum from his claim for contribution upon his co-sureties.<sup>5</sup>

<sup>1</sup> Deering *v.* Winchelsea, 2 Bos. & Pul. R. 270; Mahew *v.* Crickett, 2 Swanst. R. 185; Norton *v.* Coons, 3 Denio, R. 130; Chaffee *v.* Jones, 19 Pick. R. 260; Kemp *v.* Finden, 12 Mees. & Welsb. R. 421; Burnell *v.* Minot, 4 Moore, R. 342; Davies *v.* Humphreys, 6 Mees. & Welsb. R. 153; Sison *v.* Kidman, 4 Scott, N. R. 429; Edgar *v.* Knapp, 6 Scott, N. R. 707; Pitt *v.* Furssord, 8 Mees. & Welsb. R. 539; Bachelder *v.* Fiske, 17 Mass. R. 468.

<sup>2</sup> Ex parte Gifford, 6 Ves. R. 805; Turner *v.* Davies, 2 Esp. N. P. C. R. 478; Thomas *v.* Cook, 8 B. & C. R. 728; Sterling *v.* Forrester, 3 Bligh, R. 590, 591; Mayhew *v.* Crickett, 2 Swanst. R. 185; Burge on Suretyship, 383; Deering *v.* Winchelsea, 2 Bos. & Pul. R. 270; Pendlebury *v.* Walker, 4 Younge & Coll. R. 424.

<sup>3</sup> Cowell *v.* Edwards, 2 B. & P. R. 268; Browne *v.* Lee, 9 D. & R. R. 700; s. c. 6 B. & C. R. 697; Rogers *v.* Mackenzie, 4 Ves. R. 752; Chaffee *v.* Jones, 19 Pick. R. 265.

<sup>4</sup> Peter *v.* Rich, 1 Chan. R. 34; Hole *v.* Harrison, 1 Chan. C. R. 246; Layer *v.* Nelson, 1 Vern. R. 456. See Deering *v.* Earl of Winchelsea, 2 Bos. & Pul. 270; s. c. 1 Cox, R. 318. In Henderson *v.* McDuffiee, 5 N. Hamp. R. 38; Mills *v.* Hyde, 19 Verm. R. 59, the same rule was held in law.

<sup>5</sup> Knight *v.* Hughes, 3 Car. & Payne, N. P. C. R. 467; s. c. 1 Mood. & Malk. N. P. C. R. 247; Roach *v.* Thompson, 1 Mood. & Malk. R. 487; Swain *v.* Wall, 1 Ch. R. 149; Ex parte Gifford, 6 Ves. R. 805.

§ 885 *a*. A surety is not bound to wait until suit is brought or judgment rendered before he pays the debt. But whenever the original contract is broken, so that the surety becomes legally and positively liable, he may pay, and his co-sureties will be bound to make contribution.<sup>1</sup> If, however, suit be brought against him, he may recover of the principal all necessary costs and expenses.<sup>2</sup>

§ 885 *b*. Each surety is entitled to his share of any sum paid by the principal to any one of his co-sureties upon the debt, and where an action is brought by one surety for contribution against his co-surety, if it appear that he has received a partial indemnity from the principal by an assignment of property, the property so assigned will be held to enure to the benefit of both sureties, and the defendant will be liable for his proportion of the debt due, after deduction thereof from the original sum.<sup>3</sup> So, also, if after recovery in such suit, further payment should be made to the plaintiff in reduction of the debt, he is bound to account therefor with the other surety.<sup>4</sup>

§ 885 *c*. Where one of several joint guarantors pays the debt for which all were bound, he acquires thereby a separate right of action against the principal for whom he has paid the money, which cannot be defeated by evidence of payment to another of the guarantors.<sup>5</sup> But if two co-sureties pay the debt out of a joint fund, their right of action is joint against the principal.<sup>6</sup>

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<sup>1</sup> Pitt *v.* Purssord, 8 Mees. & Welsb. R. 539; Cowell *v.* Edwards, 2 Bos. & Pul. R. 268; Odlin *v.* Greenleaf, 3 New Hamp. R. 270. See ante, § 33 *q* and 33 *r*, joint and several contracts.

<sup>2</sup> Post, § 887; Bonney *v.* Seely, 2 Wend. R. 481; Cleveland *v.* Covington, 3 Strob. R. 184.

<sup>3</sup> Bachelder *v.* Fiske, 17 Mass. R. 464.

<sup>4</sup> Ibid.

<sup>5</sup> Lowry *v.* Lumbermen's Bank, 2 Watts & Serg. R. 210.

<sup>6</sup> Osborne *v.* Harper, 5 East, R. 225; Boggs *v.* Curtin, 10 Serg. & Rawle, R.

§ 886. Where one has been induced to become a guarantor at the instance of another, who is co-guarantor with him, though he will be liable to the guaranteee, he will not be liable for contribution to the person at whose request he became guarantor.<sup>1</sup> So, if different sureties or guarantors should become bound by different instruments, for equal portions of the debt, neither would be liable to contribution to the other, if the contract of each were entirely separate and distinct from that of the other.<sup>2</sup> But if the contract of each made a part of that of the other, the rule would be otherwise.<sup>3</sup> So, if it be agreed between the parties that each surety shall be responsible only for a stated portion of the whole sum, the right of contribution amongst the co-sureties cannot be enforced.<sup>4</sup> And whenever there are special words in the contract, or other circumstances showing a limitation of liability for contribution in respect to one of the sureties, he will only be responsible according to the real meaning of his contract. Thus, if one of four sureties qualify his responsibility by adding to his signature the words "surety for the above names," he will not be liable for contribution to the first surety who has paid the debt.<sup>5</sup>

§ 887. The right of contribution is not limited to the original debt, but extends to all incidental expenses and costs necessary or reasonably incurred by the surety in consequence

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211; *Fletcher v. Jackson*, 23 Verm. R. 593; *Pearson v. Parker*, 3 N. Hamp. R. 366; *Jewett v. Cornforth*, 3 Greenl. R. 107. But see *Gould v. Gould*, 8 Cowen, R. 168.

<sup>1</sup> *Turner v. Davies*, 2 Esp. N. P. C. R. 478; *Thomas v. Cook*, 8 B. & C. R. 728.

<sup>2</sup> *Coope v. Twynam*, 1 Turn. & Russ. R. 426; *Cooke v. \_\_\_\_\_*, 2 Freem. R. 97; *Craythorne v. Swinburne*, 14 Ves. R. 160.

<sup>3</sup> 1 Story, Eq. Jurisp. § 495, 498.

<sup>4</sup> *Pendlebury v. Walker*, 4 Younge & Coll. R. 424; *Burge on Suretyship*, 385.

<sup>5</sup> *Harris v. Warner*, 13 Wend. R. 400.

of the default of the principal;<sup>1</sup> and it exists between all sureties of the same degree.<sup>2</sup> A surety cannot ordinarily recover from his co-surety contribution for the expenses of defending an action against him as surety, because it was his duty to avoid them by payment.<sup>3</sup> Yet if it appear that there was a good apparent ground of defence, it might create an exception to this rule, particularly as the authorities are quite contradictory in respect to the liability of a co-surety to contribution for costs.

§ 888. Where the contract of the surety is, that he shall be bound only upon the default of his principal and all the other co-sureties, he will not be obliged to contribute on default of the principal only.<sup>4</sup> An agreement, however, by the creditor, to give time to one surety, will not discharge the others from their liability to contribution.<sup>5</sup> A surety may also release one of his co-sureties from contribution without barring thereby

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<sup>1</sup> *Knight v. Hughes*, 3 C. & P. 467; *Theobald on Principal and Surety*, p. 269, § 286; *Bonney v. Seely*, 2 Wend. R. 481; *Cleveland v. Covington*, 3 Strob. L. R. 184; *Fletcher v. Jackson*, 23 Verm. R. 591.

<sup>2</sup> *Deering v. Winchelsea*, 2 B. & P. R. 270; s. c. 1 Cox, R. 318.

<sup>3</sup> This was the doctrine laid down by Lord Tenterden, in *Roach v. Thompson*, Mood. & Malk. R. 489; *Gillett v. Rippon*, Ibid. 406; and *Knight v. Hughes*, Ibid. 247; s. c. 3 Carr. & Payne, R. 467. The same rule was held in *Boardman v. Paige*, 11 New Hamp. R. 431, and in *Henry v. Goldney*, 15 Mees. & Welsb. 494. In *Fletcher v. Jackson*, 23 Verm. 591, the court says: "The right of the co-sureties in such cases to compel contributions for costs and expenses incurred in defending a suit depends altogether on the question, whether such a defence were made under such circumstances as to be regarded hopeful and prudent. If so, the expenses of defence may always be recovered." See, also, *Marsh v. Harrington*, 18 Verm. R. 150; *Beckley v. Munson*, 22 Conn. R. 299. The contrary rule, however, was expressly stated in *Kemp v. Finden*, 12 Mees. & Welsb. R. 424; *Davis v. Emerson*, 17 Maine, R. 64. In *Bonney v. Seely*, 2 Wend. R. 481, and in *Cleveland v. Covington*, 3 Strob. R. 185, it was held that a principal is liable to a surety for costs.

<sup>4</sup> *Craythorne v. Swinburne*, 14 Ves. R. 160.

<sup>5</sup> *Dunn v. Slee*, 1 J. B. Moore, R. 2; s. c. 1 Holt, N. P. C. R. 399.

his right of action against the rest, although he may not discharge the principal debtor.<sup>1</sup>

§ 889. The surety or guarantor, after payment of the debt, has no right to insist that the debt or instrument, by which the debt is evidenced, shall be assigned to him; for such assignment would be utterly useless, inasmuch as the debt is extinguished, and the instrument is worthless as an evidence of debt, because proof of payment is a conclusive answer to any claim depending thereupon.<sup>2</sup>

§ 890. Co-sureties or co-guarantors are, also, entitled, not only to contribution in respect of payments actually made by one; but they are also jointly entitled to receive the benefit of any securities, which have been given to any one of them as a personal indemnification.<sup>3</sup> In equity this doctrine is carried even further, and they are held to be entitled to all collateral securities, which the guarantee or creditor may have taken, whether legal or equitable.

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<sup>1</sup> *Fletcher v. Glover*, 11 N. Hamp. R. 368; *Fletcher v. Jackson*, 23 Verm. R. 591; *Kelby v. Steel*, 5 Esp. N. P. C. R. 194; *Graham v. Robertson*, 2 T. R. 282; *Parker v. Ellis*, 2 Sandf. S. C. R. 223; *Birkley v. Presgrave*, 1 East, R. 220.

<sup>2</sup> *Copis v. Middleton*, 1 Turn. & Russ. R. 224; *Hodgson v. Shaw*, 3 Mylne & Keen, R. 183; *Story, Eq. Jurisp.* § 499 *b*, 499 *c*.

<sup>3</sup> *Theobald on Principal and Surety*, ch. 11, § 283; *Swain v. Wall*, Ch. R. 149; 1 *Story, Eq. Jurisp.* § 499. But a different doctrine has been held in *Bowditch v. Green*, 3 Metc. R. 360; *Hines v. Keller*, 3 Watts & Serg. R. 401; *Commercial Bank of Lake Erie v. Western Reserve Bank*, 11 Ohio (Stanton) R. 444.

## CHAPTER XXX.

## LANDLORD AND TENANT.

§ 891. THE Statute of Frauds, 29 Car. II. ch. 3, in its first section, provides, that all leases, estates, interests in freehold, or terms of years, &c., made or created by livery of seizin only, or by *parol*, and not put in *writing*, and signed by the parties, or their agents thereto lawfully authorized by *writing*, shall have the force and effect of leases or estates *at will* only.

§ 892. The second section of the same statute *excepts* all leases, not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount to two thirds part of the full improved value of the thing demised.

§ 893. This statute, which has been generally adopted in this country, renders every *parol* lease for more than three years from the agreement inoperative.<sup>1</sup> Although *parol* leases for

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<sup>1</sup> The Massachusetts Revised Statutes, p. 408, declare all estates and interests in lands, created without writing, to be estates at will only. *Kelly v. Waite*, 12 Metcalf, R. 300. By the New York Revised Statutes, Vol. 2, p. 135, § 8, all estates and interests in lands, except leases for a term not exceeding a year, must be in writing. By the Statutes of Connecticut, 1838, p. 391, no leases of land, except for a year, are valid, except against the grantor, unless they be in writing. The Pennsylvania Statute of 1772 follows the English statute, and allows *parol* leases for a term not exceeding three years, without adding any thing as to reservation of rent. *Purdon's Dig.* 779. In other States, as

more than three years have, by the statute, the effect of leases *at will* only, yet, in consequence of the inconveniences attending such a tenancy, and in view of the intent of the statute, which was only to prevent such leases from operating as a term, the courts have, after considerable embarrassment, expressly decided, that the tenancy *at will*, created by the statute, should be considered as a tenancy from year to year.<sup>1</sup> Indeed, estates at will are at the present day almost unknown in practice, although they may be created by special agreement;<sup>2</sup> and all leases, without limit as to the period of holding, create a tenancy from year to year.<sup>3</sup>

§ 894. A parol lease for three years must commence immediately upon the making of the agreement, and cannot be made to commence from a subsequent day.<sup>4</sup> A parol lease for less than three years may, however, commence at any future day; provided that the term of the lease expire within three years.<sup>5</sup> Where a parol demise was made to hold for one year certain, and so from year to year, as long as the parties pleased, it was held to be a lease for only two years certain, and therefore to be valid, within the terms of the statute.<sup>6</sup>

§ 895. But although a parol lease for more than three years may be void as to the *duration* of the term, it will govern the

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New Jersey, Georgia, &c., the English statute is strictly followed. Elmer's Dig. 213; Prince's Dig. 215; Kent, Comm. Lect. 56, p. 95, note b.

<sup>1</sup> Clayton *v.* Blakey, 8 T. R. 3; Doe, dem. Rigge *v.* Bell, 5 T. R. 471; Comyn on Landlord and Tenant, 8-57.

<sup>2</sup> 5 B. & A. R. 604; 1 Dowl. & Ry. R. 272; 2 Black. Comm. 147; 3 Burr. R. 1609.

<sup>3</sup> Legg *v.* Strudwick, 2 Salk. R. 414; Timmins *v.* Rowlinson, 3 Burr. R. 1609; Warner *v.* Browne, 8 East, R. 165; Comyn, Landlord and Tenant, 8.

<sup>4</sup> Rawlins *v.* Turner, Lord Raym. R. 736.

<sup>5</sup> Ryley *v.* Hicks, Str. R. 651; Legg *v.* Strudwick, 2 Salk. R. 414.

<sup>6</sup> Legg *v.* Strudwick, 2 Salk. R. 414; Stromfil *v.* Hicks, Ibid. 413; s. c. Lord Raym. R. 280.

terms of the tenancy from year to year, in all other respects; as in regard to the rent, and to the time at which the tenant is to quit. Thus, where, on a lease by parol for seven years, it was agreed that the tenant should quit at Candlemas, the court held, that though the lease was void as to the duration of the term, the tenancy could only be determined by the landlord at Candlemas.<sup>1</sup>

§ 896. The exception in the statute does not, however, apply to the king; for he can only grant leases by patent under the great seal, or seal of the exchequer.<sup>2</sup> Nor does it apply to corporations aggregate, who can only lease under the corporate seal.<sup>3</sup> So, also, a lease of the wife's lands by the husband and wife must be by *deed*, or it will be absolutely void, and cannot be confirmed by the wife after the husband's death; because her assent is necessary *ab initio*, and must be by deed.<sup>4</sup>

§ 897. It often becomes a matter of great practical importance to ascertain *when an instrument operates as an immediate demise, or only an agreement to let in futuro*. No precise technical form is necessary to create an immediate demise. Nor is it necessary that it should be created by a single instrument, if from different papers it can clearly be inferred.<sup>5</sup> Whether the instrument constitute a present demise, or an agreement to let *in futuro*, depends upon the intention of the parties, which is to be inferred from all the terms, and from the nature and condition of the subject-matter, without refer-

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<sup>1</sup> Doe, dem. Rigge *v.* Bell, 5 T. R. 471; De Medina *v.* Polson, Holt, N. P. C. R. 47.

<sup>2</sup> Lane's case, 2 Coke, Rep. 17.

<sup>3</sup> Patrick *v.* Balls, 2 Carth. R. 390; s. c. Lord Raym. R. 136.

<sup>4</sup> Turney *v.* Sturges, Dyer, R. 91. This case was before the statute of frauds.

<sup>5</sup> Chapman *v.* Bluck, 5 Scott, R. 531; Moore *v.* Miller, 8 Barr, R. 272.

ence to extrinsic circumstances or subsequent acts.<sup>1</sup> Yet, if the terms be ambiguous, the act of the parties,<sup>2</sup>—or words which have been erased,<sup>3</sup>—or any circumstances of inconvenience or convenience,<sup>4</sup> may be resorted to, as a means of ascertaining such intention. In all cases, the intention of the parties, if it can be ascertained, is the sole criterion of the nature of the instrument; and although an agreement may in one part purport to be a lease, yet if, from the whole instrument, it clearly appear to have been intended only as an executory agreement for a future lease, it will be so construed.<sup>5</sup>

§ 898. Subsidiary to this intention, which is paramount, whenever it can be ascertained, the rule of interpretation is, that if, by the terms of the agreement, it be provided, that a lease shall be executed at a future time, or, that any act or thing shall be done by either party precedent to the entry of the tenant upon the premises demised, the instrument is to be considered as an executory agreement.<sup>6</sup> But, if no such stipu-

<sup>1</sup> Doe, d. Morgan *v.* Powell, 7 Man. & Grang. R. 980.

<sup>2</sup> Chapman *v.* Bluck, 5 Scott, R. 531; s. c. 4 Bing. N. C. R. 187; Doe, dem. Pearson *v.* Ries, 8 Bing. R. 181; s. c. 1 Moore & S. R. 264; Jones *v.* Reynolds, 1 Adolph. & Ell. (n. s.) R. 511; Doe, dem. Phillip *v.* Benjamin, 9 Ad. & Ell. R. 644; Rawson *v.* Eicke, 7 Adolph. & Ell. R. 451.

<sup>3</sup> Strickland *v.* Maxwell, 2 C. & M. R. 539; s. c. 4 Tyrw. R. 346.

<sup>4</sup> Morgan, dem. Dowding *v.* Bissell, 3 Taunt. R. 65.

<sup>5</sup> Doe, dem. Morgan *v.* Powell, 7 Mann. & Grang. R. 980; Poole *v.* Bentley, 12 East, R. 168; Doe, dem. Bromfield *v.* Smith, 6 East, R. 531; Morgan, dem. Dowding *v.* Bissell, 3 Taunt. R. 65; Tempest *v.* Rawling, 13 East, R. 18; Colley *v.* Streeton, 3 Dow. & R. 522; s. c. 2 B. & C. R. 23; Chapman *v.* Bluck, 4 Bing. New Cas. R. 187; Brashier *v.* Jackson, 6 M. & W. R. 551; 8 Dowl. R. 784; Perring *v.* Brook, 7 C. & P. R. 360; Pearce *v.* Cheslyn, 4 Adolph. & Ell. R. 225; Bird *v.* Higginson, 6 Adolph. & Ell. R. 824; Rawson *v.* Eicke, 7 Adolph. & Ell. R. 454; Doe, dem. Phillips *v.* Benjamin, 9 Adolph. & Ell. R. 611; Jones *v.* Reynolds, 1 Adolph. & Ell. New Ser. R. 506.

<sup>6</sup> Poole *v.* Bentley, 12 East, R. 168; Dunk *v.* Hunter, 5 B. & Ald. R. 322; Phillips *v.* Hartley, 3 C. & P. R. 121; Clayton *v.* Burtenshaw, 5 B. & C. R. 41; s. c. 7 D. & R. R. 800; Chapman *v.* Bluck, 4 Bing. New Cas. R. 187; Doe, d. Bailey *v.* Foster, 15 Law Journal, (n. s.) 263; Clarke *v.* Moore, 1 Jones & Lat. R. 723.

lation be made, or if, although such stipulation be made, the lessee is, nevertheless, to have the immediate right of entry, and is to pay rent forthwith, and the commencement and duration of the tenancy is fixed, the instrument will be considered as an immediate demise.<sup>1</sup> But, where a forfeiture would accrue from construing the instrument as a lease, it will be construed to be only an agreement for a lease.<sup>2</sup>

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<sup>1</sup> *Jenkins v. Eldridge*, 3 Story, R. 330; *Doe, d. Walker v. Groves*, 15 East, R. 244; *Comyn on Land. and Ten.* 71; *Chapman v. Bluck*, 5 Scott, R. 531; *Alderman v. Neate*, 4 Mees. & Welsb. R. 721; *Warman v. Faithfull*, 5 B. & Ad. R. 1042; s. c. 3 Nev. & Man. R. 137; *Pinero v. Judson*, 3 Moore & Payne, R. 497; s. c. 6 Bing. R. 206; *Doe, d. Pearson v. Ries*, 8 Bing. R. 178; s. c. 1 Moore & S. R. 264; *Doe, d. Wood v. Clarke*, 7 Adolph. & Ell. (n. s.) R. 211.

<sup>2</sup> *Fenny v. Child*, 2 M. & Selw. R. 255.

## CHAPTER XXXI.

## COMMENCEMENT, EXTENT, AND DURATION OF A LEASE.

§ 899. THE lease being made, the next question which arises, is in regard to the time at which the term of the lease is to commence, and its extent and duration. When a lease is made by deed, it was formerly held to be void, unless the time at which the term was to commence was distinctly and unambiguously stated.<sup>1</sup> But this strict doctrine has given way to a more equitable rule of interpretation; and it is now established, that if the intention of the parties be manifestly implied in the instrument itself,—or if, the instrument being defective, the intention be manifested by acts done by the parties, in pursuance thereof, without objection, the instrument will be interpreted so as to give effect to that intention. If, therefore, two days be mentioned in a lease, and it be uncertain, from the terms, on which of the two the term is to commence, and actual entry of the tenant on one of the two days, without objection by the landlord, will determine the day. So, also, if the day be doubtfully designated, the same rule applies; as, where a lease for years was made to commence at the feast of our Lady Mary, it was held, that the tenant might, by his entry, determine which feast was intended.<sup>2</sup>

<sup>1</sup> *Foot v. Berkley*, 1 Sid. R. 461; s. c. 2 Keb. R. 656; Anon. 1 Mod. R. 180. In the latter case, the court were, however, divided in opinion.

<sup>2</sup> Anon. 1 Leon. R. 227; Periam, J., doubted, however. But the actual entry was evidence of the intention, which is the true criterion.

§ 900. Where the time, at which the lease is to commence, is designated by reference to something which is supposed to exist, but which does not in fact exist; as, if a lease be expressed to commence from the date, and there be no date, or an impossible date;<sup>1</sup> or, from the making of a former lease, and no such lease exist, or be void;<sup>2</sup> the lease will commence from the delivery thereof, that being the best evidence of the intention of the parties. Where a lease bears a specific date, and the time at which it shall commence is not otherwise expressed, the day of the date is to be taken as the time of its commencement.<sup>3</sup>

§ 901. If the tenancy be by parol, and there be no agreement as to the time at which it is to commence, the presumption is, that it commences on the day of the tenant's entry.<sup>4</sup> This presumption may, however, be rebutted by evidence. Thus, where a tenant entered in the middle of a quarter, and, afterwards, paid a proportion of the rent to the next regular quarter day, at Christmas, from which time he paid half-yearly; it was held, that his tenancy commenced at Christmas.<sup>5</sup> But if the tenant enter in the middle of a quarter, as on the 7th of May, *and never pay rent*, his tenancy commences on the day of his entry; and a six months' notice to quit, expiring May 7th of the following year, is a good notice.<sup>6</sup>

§ 902. Where the lease is properly dated, and is to commence from the day of the date, it was formerly held, that the day is excluded, and that the lease commences on the day after;

<sup>1</sup> Co. Lit. 46, b; Bacon, Abr. Leases, E. rule 2.

<sup>2</sup> Miller v. Manwaring, Cro. Car. R. 397; s. c. Sir W. Jones, R. 355; Bassett v. Lewis, 1 Lev. R. 77; Bacon, Abr. E. rule 2.

<sup>3</sup> Keyes v. Dearborn, 12 N. Hamp. R. 52; Bishop v. Wraith, 26 Eng. Law & Eq. R. 568.

<sup>4</sup> Kemp v. Derrett, 3 Camp. R. 510.

<sup>5</sup> Doe, d. Holcomb v. Johnson, 6 Esp. R. 10; Doe v. Stapleton, 3 C. & P. R. 275; Doe, d. Wadmore v. Selwyn, Adams, Eject. 129.

<sup>6</sup> Doe v. Matthews, 20 Eng. Law & Eq. R. 295.

but where it is to commence from the date, it was held to commence upon the day of the date, including it.<sup>1</sup> This trifling and subtle distinction has, however, been long exploded, and wherever there is any question as to the day, it is determined solely by the intention of the parties, as discoverable from the instrument.<sup>2</sup> The words, whatever they may be, are to be interpreted so as to meet that apparent intention, and are inclusive or exclusive, according to the reason of the thing and the nature of the case.<sup>3</sup> The question is, therefore, a mere matter of construction, under the general rules of interpretation.<sup>4</sup> Ordinarily, the day of the demise is held to be inclusive, however; for when there is nothing else to guide the construction, that one is assumed which is most beneficial to the lessee.<sup>5</sup>

§ 903. Where the lease is made for an unlimited time, it has been held, from the time of Henry VIII., to create a tenancy from year to year, not determinable at the will of either party, nor at the end of the current year, unless a notice to quit be regularly served.<sup>6</sup>

§ 904. Where the lease is merely said to be *for years*, it is a lease for two years certain, and afterwards from year to year.<sup>7</sup>

<sup>1</sup> Hatter *v.* Ash, Lord Raym. R. 84; Bacon, Abr. Leases, E. rule 2.

<sup>2</sup> Pugh *v.* Duke of Leeds, Cowp. R. 714.

<sup>3</sup> Lester *v.* Garland, 15 Ves. R. 248.

<sup>4</sup> See ante, *Construction*.

<sup>5</sup> Lysle *v.* Williams, 15 Serg. & Rawle, R. 135; Donaldson *v.* Smith, 1 Ash. R. 197. See, also, King *v.* Justices of Cumberland, 4 Nev. & Man. R. 375. In Glassington *v.* Rawlins, 3 East, R. 407, the rule is declared to be that, where the computation of time is to be from an act done, the day when such act is done is to be included. So, also, Clayton's Cases, 5 Co. 1 *a*; Bellasis *v.* Hester, 1 Lord Raym. R. 280; The King *v.* Adderley, Doug. R. 463; Castle *v.* Burditt, 3 T. R. 623; 4 Kent, Comm. Lect. 56, note *b*.

<sup>6</sup> Legge *v.* Strudwick, 2 Salk. R. 414; Timmins *v.* Rowlinson, 3 Burr. R. 1609; Warner *v.* Browne, 8 East, R. 165; Comyn, Land. and Ten. 8.

<sup>7</sup> Stromfil *v.* Hicks, 2 Salk. R. 413; Harris *v.* Evans, 1 Wils. R. 262; Birch *v.* Wright, 1 T. R. 380; Denn *v.* Cartwright, 4 East, R. 32. See Doe, d. Chadborn *v.* Green, 9 Adolph. & Ell. R. 658.

But if the tenant, by the terms of the agreement, be subject to quit at three months' notice, he is a tenant only from quarter to quarter.<sup>1</sup> And in the case of lodgings taken generally at a certain sum *per annum*, payable half-yearly, a tenancy of only a year will arise, so that the tenant can quit at the expiration of the first year, without any notice to quit.<sup>2</sup>

§ 905. In respect to the time when leases for years terminate, there has been some diversity of judgment; but the general understanding now is, that terms for years last during the whole anniversary of the day from which they are granted.<sup>3</sup> Thus, for example, a lease dated on the 25th day of March, 1809, for twenty-one years more, will not terminate until the end of the 25th of March, 1830.<sup>4</sup>

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<sup>1</sup> *Kemp v. Derrett*, 3 Camp. R. 510; *Panton v. Isham*, 3 Lev. 359. But see *Rex v. Herstmonceaux*, 7 B. & C. R. 551.

<sup>2</sup> *Wilson v. Abbott*, 3 B. & C. R. 88; s. c. 4 D. & R. R. 693; *Right v. Darby*, 1 T. R. 159.

<sup>3</sup> *Ackland v. Lutley*, 9 Adolph. & Ell. R. 879.

<sup>4</sup> *Ibid.*

## CHAPTER XXXII.

## RIGHTS AND LIABILITIES OF THE LANDLORD.

§ 906. WE now come to the Rights and Liabilities of the Landlord and Tenant in respect of each other; and in the first place, as to the Rights and Liabilities of the Landlord.—When a lease is made for years, the lessor is understood to make an implied covenant to the lessee, that no person claiming through or under him, or having a superior title to him, shall disturb the lessee in his quiet enjoyment and use of the premises leased.<sup>1</sup> It is not necessary, however, that the lessee should be ousted in order to constitute a breach of this implied covenant.<sup>2</sup> And if a man undertake to demise premises, which he has no right to demise, the lessee may maintain an action against him for breach of covenant, if he be prevented from entering the premises.<sup>3</sup> If the landlord do any act in violation of his right of quiet possession,—as, if he grant a prior lease to a third person, it is a breach of his covenant, although no actual disturbance arise therefrom to the lessee.<sup>4</sup> So, also, if the lessor covenant, that his lessee shall quietly enjoy a certain close, and afterwards set a gate across a lane

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<sup>1</sup> *Bandy v. Cartwright*, 20 Eng. Law & Eq. R. 374, although the lease is by parol.

<sup>2</sup> *Holder v. Taylor*, Hob. R. 12 a.; *Hackett v. Glover*, 10 Mod. R. 142.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Andrews v. Paradise*, 8 Mod. R. 318; *Hammond v. Hill*, 1 Com. R. 180; *Salmon v. Bradshaw*, Cro. Jac. R. 304; s. c. 9 Rep. 60; *Ludwell v. Newman*, 6 T. R. 458.

leading thereto, which is an obstruction, the covenant is broken. The landlord may, however, make use of all the ways appurtenant to the tenement leased, in order to view waste, or to demand rent, or to remove an obstruction.<sup>1</sup> But no such undertaking is implied in respect to the wrongful acts of strangers; and if the lessee be disturbed or evicted by any one having no title, his remedy is against the trespasser and not the lessor.<sup>2</sup>

§ 906 a. It is not necessary, however, that there should be a physical eviction or expulsion by the landlord to operate as a suspension of the tenant's liability to pay rent. But it is sufficient for the tenant to prove, that there was an interference with or disturbance of his beneficial enjoyment of the demised premises, by the landlord, intentionally committed and injurious in its character.<sup>3</sup> So, also, if the lessor interfere to disturb

<sup>1</sup> Proud *v.* Hollis, 1 B. & C. R. 8.

<sup>2</sup> Year-Book, 22 Henry VI. 52, b; 32 Henry VI. 32, b; Andrew's Case, Cro. Eliz. R. 214; s. c. 2 Leon. R. 104; Tisdale *v.* Essex, Hob. R. 34 b; s. c. Moore, R. 861; Iggleston *v.* May, 9 Ves. R. 330; Bac. Abr. Covenant, B.; Hayes *v.* Beckerstaff, Vaugh. R. 118; Dudley *v.* Folliott, 3 T. R. 584.

<sup>3</sup> Per Sandford, J., in Cohen *v.* Dupont, 1 Sandf. (Sup. Ct.) R. 261, 264. The court in this case say, "The defendant's principal, Dr. Chase, occupying the second floor of the house, had reserved to himself, in the lease, the privilege of exercising his vocation as a dentist. His business would necessarily lead to many visits to his apartments, and to the more in proportion to his prosperity. It seems that the calls made upon him were in fact numerous; and either because they were disturbed by the constant ringing of the door-bell, or from mischievous or malicious motives, some of the plaintiff's family resorted to the expedient of muffling the bell. This was done frequently, and was continued, after the tenant remonstrated with the plaintiff against it, and after the latter, by the exercise of his authority, should have stopped it effectually. The consequence of this conduct was, that persons coming to visit the tenant as a dentist, would pull at the bell, and wait from fifteen to twenty minutes, and half an hour, before effecting an entrance, and sometimes were compelled to leave, without succeeding in getting into the house. And, if persisted in, the effect of such conduct would be seriously to impair, if not to destroy, the tenant's professional business."

"In addition to this, and calculated to affect the tenant in the same way,

the lessee in the free use of the premises, the lessee may maintain an action of covenant against him.<sup>1</sup> But if the lease be made by a tenant for life, the covenant of quiet enjoyment is restricted to his lifetime, and does not extend to the heirs of the remainder after his death.<sup>2</sup>

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there were a variety of minor offences committed by the plaintiff's family. They littered the stair-carpet with nut-shells, dirt, and other filth, with the sweepings from the story above, and with water spilled upon it, and placed snow-balls in the window-sill, &c., to drip upon the carpet. On one occasion, a placard was put on the stairway to call attention, by his name, to the filthy condition of the tenant's stairs; such condition being in spite of great efforts on his part to keep it clean. Impertinent and insulting language was addressed by the plaintiff's family to persons visiting the tenant on business; and loud singing and like noises were made on the stairway, calculated to disturb such persons.

"In reference to the tenement as the tenant's dwelling, he, his wife, and his widowed sister were repeatedly and frequently subjected, by the plaintiff and his family, to insulting and abusive language, to hearing obscene noises at their door, and to a variety of similar annoyances, petty in their detail and taken singly, but in the aggregate sufficient to render them very uncomfortable and unhappy.

"Such being the evidence in the case, the jury held that it proved an eviction of the tenant; and we think their conclusion was correct.

"It is no longer necessary that there should be a physical eviction or expulsion by the landlord, to operate as a suspension of the tenant's liability to pay rent. It is sufficient for the tenant to prove that there was an interference with or disturbance of his beneficial enjoyment of the demised premises by the landlord, intentionally committed and injurious in its character. This was established by the court of errors in *Dyett v. Pendleton*, 8 Cowen, R. 727; and the doctrine has commended itself to the good-sense of the bar and the community. The case of *Ogilvie v. Hull*, 5 Hill, R. 52, does not in any respect conflict with the rule laid down in *Dyett v. Pendleton*; and if it did, we should be bound by the decision of the superior tribunal. In this case, there was an intentional disturbance by the landlord's family, for which he was chargeable, with the tenant's beneficial use and enjoyment of the tenement in question, seriously injurious to his business, as well as destructive of the comfort of himself and his family. This constituted an eviction by the landlord, which precludes him from recovering for the rent of the premises."

<sup>1</sup> *Ponfret v. Ricroft*, 1 Saund. R. 321; s. c. 1 Ventr. 26, 44; 1 Sid. R. 429; 2 Keb. R. 505, 569.

<sup>2</sup> *Adams v. Gibney*, 6 Bing. R. 656; s. c. 4 Moore & Payne, R. 510.

§ 907. So, also, if a man make a lease by parol, there is an implied promise by the lessor to put the lessee in possession, and if he do not do so within a reasonable time, an action will lie against him.<sup>1</sup> And if, in consequence of the refusal or failure of the landlord to give possession of the premises, the tenant suffer inconvenience and loss, he may recover damages therefor against the landlord.<sup>2</sup> So, if apartments be leased, a promise is implied on the part of the lessor to allow to the tenant all incidents which are necessary or proper for their reasonable and comfortable enjoyment, such as the benefit of the skylight on the staircase, the use of the water closet, and the door-bell or knocker.<sup>3</sup>

§ 907 a. Again, the landlord impliedly covenants, that the premises are fit for beneficial occupation. If, therefore, they be at the time of the letting rendered actually prejudicial to health and decency by a nuisance connected with them, the tenant may leave, and will not be liable for rent, unless the landlord immediately abate the nuisance. Where, therefore, certain apartments were let, and the wall of a privy on the ground-floor below them gave way and overflowed the kitchen with filth, and impregnated the water of the pump, and the landlord did not remove the difficulty after complaint by the tenant, rent was held not to be recoverable by the landlord.<sup>4</sup> So, also, where a furnished house was let, and the beds were infested with bugs to such an extent as to render them utterly unfit for occupation; it was held, that the landlord could not recover rent therefor; the contract for occupation being entire.<sup>5</sup> But the mere fact that the premises are unwholesome, would not entitle a tenant to quit them, where he had the knowledge

<sup>1</sup> *Coe v. Clay*, 3 Moore & Payne, R. 57; s. c. 5 Bing. R. 440; *Hawkes v. Ortin*, 5 Adolph. & Ell. R. 367.

<sup>2</sup> *Driggs v. Dwight*, 17 Wend. R. 71.

<sup>3</sup> *Underwood v. Burrows*, 7 Car. & Payne, R. 29.

<sup>4</sup> *Cowie v. Goodwin*, 9 Car. & Payne, R. 378.

<sup>5</sup> *Smith v. Marrable*, 11 Mees. & Welsb. R. 5.

or means of knowledge of the fact, and where the landlord has been guilty of no fraud or misrepresentation, and is in no default.<sup>1</sup> It must, also, clearly appear, that the premises are unfit for beneficial occupation, or the tenant will not be justified in leaving.<sup>2</sup> So, also, if the landlord, between the making and the commencement of the lease, render the house unfit for use, the tenant may refuse to take possession.<sup>3</sup> Whether, if the premises without default of the landlord be rendered unfit for occupation after the letting, and during the occupation, the tenant could leave, seems to be somewhat doubtful.<sup>4</sup>

§ 908. These implied covenants only exist in the absence of an express agreement in relation to the subject-matter thereof, and, of course, may be qualified by any special agreement of the parties. In such a case, the question, what constitutes a breach, must depend on the terms of the agreement. The landlord is not bound to repair or rebuild the premises in any event, unless there be an express covenant to that effect in the lease.<sup>5</sup> If the landlord insure the premises, and they be burnt down, he is not bound to apply the insurance to the rebuilding thereof; and a court of equity will not restrain him from suing for the rent for the whole term.<sup>6</sup> He is, also, entitled at law to recover the rent, notwithstanding the premises are burnt down, or otherwise destroyed, if he have not agreed to rebuild.<sup>7</sup> If there be an express covenant by the

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<sup>1</sup> *Westlake v. De Graw*, 25 Wend. R. 669. See also post, § 931 a.

<sup>2</sup> *Hart v. Windsor*, 12 Mees. & Welsb. R. 68.

<sup>3</sup> *Cleves v. Willoughby*, 7 Hill, R. 83.

<sup>4</sup> Remark of Cresswell, J., on *Smith v. Marrable*, (11 Mees. & Welsb. R. 5,) in *Surplice v. Farnsworth*, 7 Man. & Grang. R. 580; *Sutton v. Temple*, 12 Mees. & Welsb. R. 52; *Gott v. Gandy*, 22 Eng. Law & Eq. R. 173; *Moffat v. Smith*, 4 Comst. R. 126.

<sup>5</sup> *Hill v. Woodman*, 2 Shep. R. 38.

<sup>6</sup> *Belfour v. Weston*, 1 T. R. 312; *Leeds v. Cheetham*, 1 Sim. R. 146; *Holtzapffel v. Baker*, 18 Ves. jr. R. 117.

<sup>7</sup> *Fowler v. Bott*, 6 Mass. R. 63; *Izon v. Gorton*, 5 Bing. New Cas. R. 501; post, § 931 a.

lessor, that he will, in case the premises shall be consumed, rebuild and replace them in the same condition as they were before the fire, he is only bound to restore them to the state in which they were when they were let by him, and not to rebuild additions made by the tenant.<sup>1</sup> But if there be no such express covenant to rebuild, in case of fire or other casualty, he is not bound to rebuild, and his lease will be entirely terminated, unless it be of such a nature as to give him an interest in the land. Where, therefore, a demise was made of basement rooms of several stories in height, without any stipulation by the landlord to rebuild in case of fire, and the whole building was burned down, it was held, that, as the lease gave no interest to the lessee in the land, his whole interest was terminated, although he had paid his rent in advance.<sup>2</sup>

§ 909. The landlord is bound to pay the land-tax eventually; for although it be incumbent on the tenant to pay it in the first instance, he may then deduct it from the rent. The landlord is not, however, bound to pay any additional land-tax upon the improvements of the estate made by the tenant,<sup>3</sup> but only upon the premises as originally demised.

§ 910. The rights of the landlord against third persons are in respect of his reversion only, and if any act be done injurious thereto, he may recover against the wrongdoer in an action on the case; as if a stranger, by stopping up a rivulet, cause the timber on the estates demised to decay, or, by erect-

<sup>1</sup> *Loader v. Kemp*, 2 Car. & Payne, R. 375; *Per Best*, Ch. J.

<sup>2</sup> *Stockwell v. Hunter*, 11 Metcalf, R. 448. See to the same point *Izon v. Gorton*, 7 Scott, R. 537.

<sup>3</sup> *Hyde v. Hill*, 3 T. R. 377; *Yaw v. Leman*, 1 Wils. R. 21; *Whitfield v. Brandwood*, 2 Stark. R. 440; *Watson v. Atkins*, 3 B. & Ald. R. 647. In Massachusetts, the tenant may deduct only one half the tax paid by him from the rent; and the landlord may recover one half of the taxes paid by himself in an action against the tenant. Mass. Rev. Stat. ch. 7, sect. 8.

ing a wall, obstruct the light of the mansion-house.<sup>1</sup> But the landlord will not be bound by the permissive acquiescence of his tenant in the act of a stranger, unless he had knowledge thereof, and impliedly assented thereto. Thus, if a tenant for years permit a stranger to open windows over the premises, and keep them open for twenty years, so as to create a prescriptive right therein, the landlord may treat them as if they were new lights.<sup>2</sup>

§ 911. The landlord, during the lease, is subject to no liabilities in respect to possession; and he is not liable for injuries happening to strangers from the ruinous state of the premises, or of the fences,<sup>3</sup> unless he is bound by the lease to repair.<sup>4</sup>

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<sup>1</sup> 2 Roll. Abr. 551, C. 46; Bedingfield *v.* Onslow, 3 Lev. R. 209.

<sup>2</sup> Daniel *v.* North, 11 East, R. 372.

<sup>3</sup> Cheetham *v.* Hampson, 4 T. R. 318.

<sup>4</sup> Payne *v.* Rogers, 2 H. Bl. R. 349; Leslie *v.* Pounds, 4 Taunt. R. 649.

## CHAPTER XXXIII.

## RIGHTS AND LIABILITIES OF THE TENANT.

§ 912. THE tenant is bound to treat the premises demised to him in such a manner, as that no injury may accrue to them other than that which is necessary, and incidental to their use. He is, therefore, bound to cultivate the soil properly; to preserve the timber, and to make proper repairs, although there be no express agreement to that effect; and a breach of such implied covenant renders him liable for waste.<sup>1</sup>

§ 913. It is a general principle, that the law will not consider that to be waste which is not in any way prejudicial to the inheritance; although the presumption is, that any change in the nature of the thing is waste.<sup>2</sup> So, also, all waste, which results from inevitable accidents, or overwhelming necessity, is excusable; as if a house be prostrated by tempest, or be burnt by lightning, or trees be blasted and thrown down by violent winds. In such cases, he is only bound to take proper precautions to prevent injuries, and to repair them when made.<sup>3</sup> But, although an injury occasioned by inevitable accident be not, ordinarily, considered waste, yet, if the oppor-

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<sup>1</sup> Co. Litt. 53, *a, b.*

<sup>2</sup> Bacon, Abr. Waste, C. 1.

<sup>3</sup> Bacon, Abr. Waste, E.; Com. Dig. Waste, E. 5.

tunity or occasion of such accident were afforded by the neglect or default of the tenant, it will be treated as waste.<sup>1</sup> Thus, if the premises be left in so ruinous a condition, that they are thrown down in a heavy wind, under circumstances in which, if they had been kept in proper repair, they would have been uninjured, the tenant is liable for waste. So, also, if, from neglect in properly closing the blinds, the glass is broken by hail, or if, through want of properly repairing lightning rods, when the tenant is bound so to do, the house be burnt, the tenant is liable therefor as waste. So, also, if, after injury by inevitable accident, the tenant omit to repair, it is waste.<sup>2</sup>

§ 914. Waste is either voluntary or permissive; the one being an offence of commission, and the other of omission.<sup>3</sup> Waste may be incurred in respect of,—1st. The Soil; 2d. The Buildings; 3d. The Trees and Fences; 4th. The Livestock.<sup>4</sup>

§ 915. And, first, as to the *Soil*. It is voluntary waste to dig and carry away the soil; or to open mines, gravel, or pits;<sup>5</sup> or materially to change the quality of the soil, or the nature of its produce; as by turning pasture-land into arable land, or garden ground into tillage, or ploughing up strawberry beds, or sowing grain in hop grounds.<sup>6</sup> It is not waste, however, to dig in mines or pits which are al-

<sup>1</sup> Bacon, Abr. Waste, E. 1, 2; Anon. Mogre, 62; Co. Litt. 53, a; Com. Dig. Waste, E. 5.

<sup>2</sup> Co. Litt. 53, a.

<sup>3</sup> Com. Dig. Waste, D. 1 to D. 5; Co. Litt. 53 b.

<sup>4</sup> Com. Dig. Waste, D. 2 to D. 5.

<sup>5</sup> Co. Litt. 53, b; Nowell *v.* Donning, 2 Roll. Abr. 816, b, 15; Saunders's Case, 5 Rep. R. 12; Manwood's Case, Moore, R. 101; Moyle *v.* Mayle, Owen, R. 67; Astry *v.* Ballard, 2 Mod. R. 193; Com. Dig. Waste, D. 4.

<sup>6</sup> Tresham *v.* Laneme, 2 Roll. Abr. 814, b, 50; Harrow School *v.* Alderton, 2 B. & P. R. 86; Watherell *v.* Howells, 1 Camp. R. 227.

ready open;<sup>1</sup> or to dig pits for the purpose of draining;<sup>2</sup> or to take clay or marl for the purpose of repairing the buildings or improving the land.<sup>3</sup>

§ 916. It is permissive waste to the soil to suffer it to fall into decay, or to be overflowed through negligence in allowing the embankments to fall into decay. But, if the overflowing be caused by tempest, the tenant will only be liable to repair it.<sup>4</sup> So, also, the tenant is bound to keep the soil in a proper state of cultivation; to till it in a husbandly manner; to observe the ordinary mode of cultivation, and the usage and custom of the neighborhood, or he will be liable for waste.<sup>5</sup>

§ 917. Second, as to *Buildings*. It is voluntary waste to buildings to pull them down, to unroof them,<sup>6</sup> or to alter the house to the lessor's prejudice; as, if he convert a hall into a stable;<sup>7</sup> or throw two rooms into one;<sup>8</sup> or take away such things as are fastened and fixed to the freehold, or such buildings as are let into the ground, whether they were erected by the tenant or not.<sup>9</sup> The tenant may, however, by proving that such changes were beneficial to the lessor, contradict the presumption of waste.<sup>10</sup>

<sup>1</sup> Saunders's Case, 5 Rep. R. 12.

<sup>2</sup> Altham's Case, 2 Roll. Abr. 820, 823.

<sup>3</sup> Co. Litt. 53; Moyle *v.* Mayle, Owen, R. 67.

<sup>4</sup> Co. Litt. 53, *a*, 62; Roll. Abr. 816, l. 32; Anon. Moore, R. 62; Griffith's Case, Ib. 69; Anon. Ib. 73; Com. Dig. Waste, D. 4.

<sup>5</sup> Powley *v.* Walker, 5 T. R. 373; Brown *v.* Crump, 1 Marsh. R. 567; s. c.

<sup>6</sup> Taunt. R. 300; Legh *v.* Hewitt, 4 East, R. 154; Webb *v.* Plummer, 2 Barn. & Ald. R. 746; Horsefall *v.* Mather, Holt. N. P. R. 7; White *v.* Nicholson, 4 Man. & Gran. R. 98.

<sup>7</sup> Co. Litt. 53, *a*; Com. Dig. Waste, D. 2.

<sup>8</sup> Greene *v.* Cole, 2 Saund. R. 252; s. c. 1 Lev. R. 309.

<sup>9</sup> 2 Roll. Abr. 815, l. 37; Com. Dig. Waste, D. 2.

<sup>10</sup> Elwes *v.* Maw, 3 East, R. 38; Poole's Case, 1 Salk. R. 368; Wyndham *v.* Way, 4 Taunt. R. 316; Com. Dig. Waste, D. 2.

<sup>11</sup> Com. Dig. Waste, D. 2; Bacon, Abr. Waste, C. 1.

§ 918. The tenant may, however, lawfully remove the following things, wherever he himself has erected them: 1st. Mere personal things not fixed to the freehold; 2d. Buildings not let into the ground, but standing on stocks or rollers;<sup>1</sup> 3d. Things merely ornamental, although fixed to the freehold,<sup>2</sup> as hangings,<sup>3</sup> pier-glasses,<sup>4</sup> wainscots fixed with screws only,<sup>5</sup> beds fastened to the ceiling or wall with ropes or nails,<sup>6</sup> marble chimney-pieces;<sup>7</sup> 4th. Things put up slightly for domestic use, and capable of removal without material injury to the estate, and without loss of their essential value and character, such as cabinets,<sup>8</sup> bells,<sup>9</sup> blinds,<sup>10</sup> stoves,<sup>11</sup> grates,<sup>12</sup> gas fixtures;<sup>13</sup> 5th. Fixtures erected for the purposes of trade or manufactures solely,<sup>14</sup> unless there is a covenant to the con-

<sup>1</sup> *Cutting v. Tuffnall*, Bull. N. P. R. 34; *Wansbrough v. Maton*, 4 Ad. & Ell. R. 884; *The King v. Inhabitants of Otley*, 1 B. & Ad. R. 161; Amos on Fixtures, 3, 4, 5, note a.

<sup>2</sup> *Buckland v. Butterfield*, 4 Moore, R. 440.

<sup>3</sup> *Beck v. Rebow*, 1 P. Wms. R. 95; *Elwes v. Maw*, 3 East, R. 38.

<sup>4</sup> *Beck v. Rebow*, 1 P. Wms. R. 95.

<sup>5</sup> *Ex parte Quincy*, 1 Atk. R. 477.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid. Lawton v. Salmon*, 1 H. Bl. R. 259, note; *Elwes v. Maw*, 3 East, R. 38; *Leach v. Thomas*, 7 C. & P. R. 328; *Grimes v. Boweren*, 6 Bing. R. 439.

<sup>8</sup> Amos on Fixtures, 278, n.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Colegrave v. Dias Santos*, 2 B. & C. R. 77; *Greene v. First Parish*, 10 Pick. R. 504.

<sup>11</sup> *Rex v. Inhabitants of St. Dunstan*, 4 B. & C. R. 686; *Greene v. First Parish*, 10 Pick. R. 504; *Gray v. Holdship*, 17 Serg. & R. R. 415.

<sup>12</sup> *Rex v. Inhabitants of St. Dunstan*, 4 B. & C. R. 686.

<sup>13</sup> *Lawrence v. Kemp*, 1 Duer, R. 363.

<sup>14</sup> *Cresson v. Stout*, 17 Johns. R. 116; *Gale v. Ward*, 14 Mass. R. 352; *Raymond v. White*, 7 Cow. R. 319; *Lemar v. Miles*, 4 Watts, R. 330; *Reynolds v. Shuler*, 5 Cow. R. 323. For a discussion of the subject of Fixtures, see *Hellawell v. Eastwood*, 6 Exch. R. 295; *Wiltshire v. Cottrell*, 18 Eng. Law & Eq. R. 147.

trary; such as a baker's oven,<sup>1</sup> a dyer's<sup>2</sup> or soap-boiler's vats,<sup>3</sup> a varnish house,<sup>4</sup> cider mills,<sup>5</sup> furnaces.<sup>6</sup>

§ 919. Permissive waste to buildings consists in omitting to keep them in tenantable repair; as by suffering the timbers to rot through neglect properly to protect them, or the ground-sill to decay from neglect to secure a moat or ditch,<sup>7</sup> or the walls to fall into decay for want of plastering.<sup>8</sup>

§ 920. *Trees and Fences.* Timber is part of the inheritance. It is waste to cut it down, or to lop it, so as to occasion its decay. The age at which trees become timber depends, however, in a measure, on local custom. So, also, to cut down trees, not being timber; but growing in defence of the house, is waste. So, also, it is waste to cut down fruit-trees in an orchard or garden.<sup>9</sup>

§ 921. The old common law holds in especial protection every tree in the kingdom, delights in its beauty, and is jealous of its injury. To the lessee it gives the benefit of its cool shadow, wherewith to refresh himself, and to shelter his cattle from the burning heat. The fruit also which grows on its branches is bestowed upon him, but he is forbidden to cut or lop a limb, for any purpose, unless it be justified by strong necessity, and required for immediate use. The tenant is there-

<sup>1</sup> Year-Book, 20 Henry VII. 13 b; Winn *v.* Ingilby, 5 B. & Ald. R. 625.

<sup>2</sup> Year-Book, 20 Henry VII. 13 b.

<sup>3</sup> Poole's Case, 1 Salk. R. 368.

<sup>4</sup> Penton *v.* Robart, 2 East, R. 88.

<sup>5</sup> Lawton *v.* Lawton, 3 Atk. R. 14; s. c. 1 H. Bl. R. 259, n. a.; Lord Dudley *v.* Lord Warde, Ambl. R. 113; Bacon, Abr. Waste, C. 86.

<sup>6</sup> Ibid.

<sup>7</sup> Com. Dig. Waste, D. 2; Sticklehorne *v.* Hatchman, Owen, R. 43.

<sup>8</sup> Co. Litt. 53, a; 2 Roll. Abr. 815; l. 31, l. 42.

<sup>9</sup> Co. Litt. 53, a b; 3 Roll. Abr. 817; Bacon, Abr. Waste, C. 2; Com. Dig. Waste, D. S.

fore allowed to cut timber trees wherewith to repair his house and fences, although he covenanted to repair at his own cost.<sup>1</sup> But he is restricted to that which is necessary to keep the identical premises only in repair which were originally let, and is not allowed to cut trees to repair any new erections or additions made by him. So, also, he cannot cut wood for repairs occasioned by his own negligence.<sup>2</sup> The timber cut for repairs must be specifically used for that purpose, and cannot be sold, so as to raise funds with which to repair.<sup>3</sup>

§ 922. A lessee for years can only cut bushes and small wood, for the purposes of fuel. He cannot cut timber trees, unless he be expressly permitted by the terms of the lease. He may, however, cut down dead wood, and such trees as are neither timber trees, nor fruit-trees growing in an orchard or garden, nor trees growing in defence of the house.<sup>4</sup>

§ 923. *Live-Stock.* It is waste to take or destroy so much live-stock, as to unstock the dove-cote, warren, or park, so that less is left when the tenant leaves the premises than there was at the time of the demise. So, also, to fill up the pigeon-holes, so that the pigeons cannot build, is waste.<sup>5</sup>

#### LIABILITY OF THE TENANT FOR REPAIRS.

§ 924. There is no obligation upon a landlord, in the absence of express contract to that effect, to do substantial repairs,<sup>6</sup> but

<sup>1</sup> Anon. Moore, 22; Com. Dig. Waste, D. S.

<sup>2</sup> Co. Litt. 53, b; Bacon, Abr. Waste, C. 2; Com. Dig. Waste, D. S.

<sup>3</sup> Co. Litt. 53, b; Doe, dem. Foley *v.* Wilson, 11 East, R. 56.

<sup>4</sup> Co. Litt. 536; Bacon, Abr. Waste, C. 2; Com. Dig. Waste, D. S.

<sup>5</sup> Bacon, Abr. Waste, C. 2; Vavasor's Case, 2 Leon. R. 222; Moyle *v.* Mayle, Owen, R. 66; Com. Dig. Waste, D. 3.

<sup>6</sup> Gott *v.* Gandy, 22 Eng. Law & Eq. R. 173.

the duty to make repairs devolves upon the tenant;<sup>1</sup> but what those repairs should be, must depend upon the nature and extent of his covenants, and the terms of his lease. If he be a lessee for years, in the absence of any covenant to repair, he is bound to make fair and tenantable repairs; such as putting in windows or doors that have been broken by him, or repairing fences and highways;<sup>2</sup> and keeping the premises wind and water tight, so as to prevent obvious waste and decay. But he is not bound to make lasting and general repairs; such as putting a new roof into an old wofn-out house,<sup>3</sup> or building new fences.<sup>4</sup>

§ 925. The extent to which he is bound to repair in the absence of any covenant is not very definitely limited; but he seems not to be bound to make good such deteriorations as arise from necessary wear and tear, incidental to a proper use, or for injuries resulting from inevitable accident,<sup>5</sup> unless they can be remedied at slight expense, and would otherwise occasion serious damage. But, whatever injuries are occasioned by his voluntary negligence, he is bound to repair. An outgoing tenant, however, not obliged by any covenant to repair, is only bound to leave the house wind and water tight.<sup>6</sup> But he is not bound to supply or maintain any thing in the nature of ornament, such as painting, whitewashing, or papering, unless it be necessary, in order to preserve exposed timber from decay. And this rule prevails, even though the tenant be under

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<sup>1</sup> *Long v. Fitzsimmons*, 1 Watts & Serg. R. 530; *Phillips v. Monges*, 4 Whart. R. 226.

<sup>2</sup> *Cheetham v. Hampson*, 4 T. R. 318.

<sup>3</sup> *Ferguson v. ——*, 2 Esp. R. 590; Com. Dig. Estate, H. 5; *Horsefall v. Mather, Holt*, N. P. R. 7.

<sup>4</sup> *Torriano v. Young*, 6 Car. & Payne, R. 8.

<sup>5</sup> *Ibid. Ferguson v. ——*, 2 Esp. R. 590; *Colley v. Streeton*, 2 Barn. & Cres. R. 273; *Woodfall on Landlord and Tenant*, by Harrison, 398, 2d ed.; *Auworth v. Johnson*, 5 Car. & Payne, R. 239.

<sup>6</sup> *Leach v. Thomas*, 7 Car. & Payne, R. 328; *Auworth v. Johnson*, 5 Ibid. 239.

a covenant to leave the premises "in good and sufficient repair, order, and condition."<sup>1</sup>

§ 926. If the tenant covenant to repair generally, he will be bound to restore the building in as good a state as it was when he entered it, to make good all deteriorations arising from natural decay, and all injuries resulting from inevitable accident.<sup>2</sup> Thus, if a house be consumed by fire, he is bound to rebuild it within reasonable time. So, also, a general covenant to repair extends to all buildings erected during the term, as well as to the buildings existing on the land when it is demised.<sup>3</sup>

§ 926 *a.* But a tenant is not liable for acts or omissions, which would be breaches of his covenants, before the time of the execution of the lease; although the *habendum* of the lease state the premises to be held from a day prior to its execution.<sup>4</sup> And where a tenant for years agrees to keep the premises in repair during his tenancy, and before the expiration of his term an action is brought against him for breach of this agreement, the landlord is only entitled to recover nominal damages.<sup>5</sup>

§ 927. Under a general covenant to repair, however, the tenant is not bound to restore the tenement in a better state than it was when he entered it.<sup>6</sup> Thus, he has been held not

<sup>1</sup> Wisc *v.* Metcalf, 10 Barn. & Cres. R. 312.

<sup>2</sup> Paradine *v.* Jane, Aleyn, R. 27; Bullock *v.* Dommitt, 6 T. R. 650; Brecknock Co. *v.* Pritchard, 6 T. R. 750; Chesterfield *v.* Bollen, 2 Comyn, R. 627; M'Kenzie *v.* M'Leod, 4 Moore & S. R. 249; s. c. 10 Bing. R. 385; Fowler *v.* Bott, 6 Mass. R. 63; Phillips *v.* Stevens, 16 Mass. R. 238.

<sup>3</sup> Douse *v.* Earle, 3 Lev. R. 264; s. c. 2 Vent. R. 126; Thresher *v.* East, London, W. W. 2 B. & C. R. 608.

<sup>4</sup> Shaw *v.* Cay, 1 Welsb. Hurlst. & Gordon, (Excheq.) R. 412.

<sup>5</sup> Marriott *v.* Cotton, 2 Car. & Kir. R. 553.

<sup>6</sup> See Standen *v.* Christmas, 10 Q. B. Rep. 35; Bears *v.* Ambler, 9 Barr, R. 193; Shaw *v.* Kay, 1 Exch. R. 412.

to be bound to lay down new floors on an improved plan.<sup>1</sup> So, where a very old house was demised, with the usual covenants to repair, the tenant was held not to be bound to restore it in an improved state, nor to avert the consequences of the elements, but only to keep it in the state in which it was at the time of the demise, by the timely expenditure of money and care.<sup>2</sup>

§ 928. Under a covenant by a lessee to repair, and leave the premises "in the same state as he found them," he is not bound to make good natural and unavoidable decay. Nor will he be liable for any injury not occasioned by his negligence or default, which is not capable of restoration; as if the trees be blown down by tempest.<sup>3</sup> But if he agree to deliver up the premises "in good repair" at the end of his term, he is bound to put them in good repair, with reference to the class to which they belong; and it is not sufficient for him to deliver them up in as good condition as when he took them, if they were not then in good repair.<sup>4</sup>

§ 929. If the tenant violate his covenant or agreement to repair, the landlord may, after due notice to the tenant, enter and repair without the lessee's assent; and the lessee will be liable for any sum reasonably expended in making the necessary and proper repairs.<sup>5</sup> If the landlord omit or refuse to repair according to his agreement, the tenant may avail himself of such breach by way of *recoupment*, upon an action of *assumpsit* to recover the rent of him.<sup>6</sup> But the tenant cannot quit the premises, and avoid a payment of the rent, upon fail-

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<sup>1</sup> *Soward v. Leggatt*, 7 Car. & Payne, R. 613.

<sup>2</sup> *Gutteridge v. Munyard*, 7 Car. & Payne, R. 129; *Mood. & Rob.* 334.

<sup>3</sup> *Shep. Touchstone*, b. 69.

<sup>4</sup> *Payne v. Haine*, 16 Mees. & Welsb. (Exchequer,) R. 541.

<sup>5</sup> *Colley v. Streeton*, 2 Barn. & Cres. R. 273; s. c. 3 Dowl. & Ryl. R. 522.

<sup>6</sup> *Whitbeck v. Skinner*, 7 Hill, R. 53.

ure of the landlord to repair according to his agreement; but is put to his remedy against the landlord.<sup>1</sup>

§ 930. So, also, if a tenant who is bound to repair, leave, and at the end of the tenancy the premises be out of repair, the jury may give the landlord, not only the amount of the expenses actually incurred in repairing, but may also allow damages for the loss of the use of the premises while such repairs were making;<sup>2</sup> and the general state of the premises at the commencement of the tenancy may be taken into consideration in assessing them.<sup>3</sup> If the tenant covenant to repair, with an express exception of casualties by fire, he is bound to pay rent, although the premises be burnt down, and be not rebuilt by the lessor after notice;<sup>4</sup> nor in such case will he be relieved in equity.<sup>5</sup>

#### LIABILITY OF THE TENANT FOR RENT.

§ 931. The liability of the lessee to pay *rent* depends upon his being put in possession, or afforded the opportunity and power to take possession, of the demised premises, and of being secured in his quiet possession against all but wrong-doers.<sup>6</sup> But the lessor is not understood to covenant that the premises are or shall continue to be during the term in any particular state or condition, or that they are fit for the purpose for which they are hired.<sup>7</sup> And the lessee is bound to

<sup>1</sup> *Surplice v. Farnsworth*, 7 Man. & Grang. R. 584.

<sup>2</sup> *Woods v. Pope*, 1 Scott, R. 536; s. c. 1 Bing. N. C. R. 467; 6 Car. & Payne, R. 782.

<sup>3</sup> *Burdett v. Withers*, 2 Nev. & P. R. 122.

<sup>4</sup> *Belfour v. Weston*, 1 T. R. 311.

<sup>5</sup> *Holtzapffel v. Baker*, 18 Ves. R. 117.

<sup>6</sup> *Hawkes v. Orton*, 5 Adolph. & Ell. R. 367; *Bird v. Higginson*, 2 Adolph. & Ell. R. 701; *Granger v. Collins*, 6 Mees. & Welsb. R. 458; *Dunn v. Di-nuovo*, 3 Scott, N. R. 487; *Wainwright v. Ramsden*, 5 Mees. & Welsb. R. 602.

<sup>7</sup> *Surplice v. Farnsworth*, 7 Mann. & Grang. R. 577; s. c. 8 Scott, N. R. 307.

pay rent, although he have had no beneficial use or enjoyment of them, unless the lessor have been guilty of any fraudulent concealment or misrepresentation.<sup>1</sup>

§ 931 a. Where a tenant agrees expressly to pay rent for a certain time, without reservation on account of unavoidable accidents, he is bound to pay the rent for the whole term, notwithstanding the destruction of the premises by fire.<sup>2</sup> And in a suit by the landlord to recover rent for premises destroyed by fire, evidence that the property was insured, and that the landlord had received the insurance money, or had received a sum of money remunerating him for the loss, out of a general relief fund, is immaterial to the issue, and cannot be used as a defence by the tenant.<sup>3</sup> But if the tenant do not agree to pay rent for a definite term, but only so long as he shall occupy the premises, and they be partly destroyed by fire, he may terminate the lease by a surrender of the residue of the premises demised. So long, however, as he remains in possession of any part, he is liable for a *pro rata* rent.<sup>4</sup>

§ 931 b. Again, a tenant is liable for rent, although he desert the premises on account of their unhealthiness, if the lessor have been guilty of no fraud or misrepresentation, and if he had the knowledge or means of informing himself of the circumstances.<sup>5</sup> But where the premises are, by default of the landlord, or without default of the tenant, rendered wholly unfit for beneficial occupation,—as by a nuisance prejudicial to

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<sup>1</sup> Sutton *v.* Temple, 12 Mees. & Welsb. R. 52; Hart *v.* Windsor, 12 Mees. & Welsb. R. 68.

<sup>2</sup> Izon *v.* Gorton, 7 Scott, R. 537; s. c. 5 Bing. N. C. R. 507; Linn *v.* Ross, 10 Ohio R. 412; Willard *v.* Tillman, 19 Wend. R. 358; White *v.* Molyneux, 2 Kelley, (Geo.) R. 124; post, § 937.

<sup>3</sup> Magaw *v.* Lambert, 3 Barr, R. 444.

<sup>4</sup> Ibid. Volentine *v.* Godfrey, 9 Verm. R. 186; Hill *v.* Woodman, 2 Shepley, R. 38; Packer *v.* Gibbins, 1 Adolph. & Ell. N. R. 421; Howard *v.* Shaw, 8 Mees. & Welsb. R. 118.

<sup>5</sup> Westlake *v.* De Graw, 25 Wend. R. 669. See post, § 937.

health,—the tenant would be justified in leaving, and no rent could be recovered from him.<sup>1</sup> It must, however, distinctly appear, that the premises are rendered wholly unfit for beneficial occupation, and a mere annoyance or inconvenience would not entitle the tenant to quit.<sup>2</sup> And if a tenant, during the term of his lease, abandon the premises, and the landlord undertake to let again, he will, nevertheless, be liable for rent up to the time that the new tenant enters and becomes liable.<sup>3</sup>

§ 931 c. Where the lease contains no stipulation as to the time when the rent is to be paid, it is to be paid at the end of each period of time by which it is regulated. Thus, if it be a lease from year to year, rent is payable at the end of the year; if from quarter to quarter, it is payable at the end of each quarter.<sup>4</sup> If no place of payment be designated in the lease, and the lessee covenant to pay rent generally, he must seek out the lessor and tender him the rent. It is no performance of the covenant for the lessee to be on the premises on the day of payment, ready and willing to pay the rent, and that the lessor is not there to receive it.<sup>5</sup>

§ 931 d. Where a lease is assigned, the assignee, as we shall see, becomes the landlord, and the tenant is liable to him for rent accruing after the grant of the premises.<sup>6</sup> But a lessee, who has paid rent in advance, is not liable for the same rent to a grantee of the land subject to the lease, who has no notice of the payment.<sup>7</sup>

<sup>1</sup> *Ibid.* *Ante*, § 908 a.

<sup>2</sup> *Hart v. Windsor*, 12 Mees. & Welsb. R. 68; *Surplice v. Farnsworth*, 7 Man. & Grang. R. 577; *Smith v. Marrable*, 11 Mees. & Welsb. R. 5; *Cowie v. Goodwin*, 9 Car. & Payne, R. 378.

<sup>3</sup> *Marseilles v. Kerr*, 6 Whart. R. 501; Post, § 951.

<sup>4</sup> *Menough's Appeal*, 5 Watts & Serg. R. 432; *Garvey v. Dobyns*, 8 Mis. R. 213; *Bordman v. Osborn*, 23 Pick. R. 295.

<sup>5</sup> *Haldane v. Johnson*, 20 Eng. Law & Eq. R. 498.

<sup>6</sup> See post, § 951 a.

<sup>7</sup> *Stone v. Patterson*, 19 Pick. R. 476.

## RIGHTS AND LIABILITIES OF THE TENANT IN RESPECT OF THIRD PERSONS.

§ 932. The tenant, during his term, assumes the place of the landlord, and is invested with all rights and powers necessary to maintain his rights of possession against all persons whatsoever. He may, therefore, maintain an action for a trespass, or for an injury consequent upon the erection of a nuisance ; and even after his term has expired, he may recover damages for an injury sustained during its continuance.<sup>1</sup> So, also, it is the duty of the tenant to repair fences and highways, although there be no agreement to that effect between the parties ; and he is liable to third persons in case of his neglect or default to make such repair ; and while he is in possession, no action can be brought for his neglect against the landlord. Whatever the landlord *ratione tenuræ*, is bound to do by way of repair, his lessee is primarily bound to do by virtue of his possession ; and he may be sued for his neglect or default so to do by third persons. Thus, where a party is bound to repair a bridge *ratione tenuræ*, his tenant for years, while in possession, will be obliged to repair, and if he neglect or omit so to do, he will be indictable therefor.<sup>2</sup>

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<sup>1</sup> 2 Roll. Abr. 591, l. 46 ; Symonds *v.* Seabourne, Cro. Car. 325 ; Bedingfield *v.* Onslow, 3 Lev. R. 209 ; Evelyn *v.* Raddish, Holt, N. P. C. 543 ; Comyn on Land. and Ten. 249.

<sup>2</sup> Regina *v.* Bucknall, Lord Raym. R. 792, 804 ; Rider *v.* Smith, 3 T. R. 766 ; Cheetham *v.* Hampson, 4 T. R. 318.

## CHAPTER XXXIV.

## OF THE DETERMINATION OF THE TENANCY.

§ 933. THE relation of landlord and tenant may be determined, 1st. By the happening of any event upon which the lease is limited; 2d. By the death of the lessor, if he be tenant for life, but not otherwise. The death of the lessor will not, however, determine the tenancy, and the executor or administrator, having the same interest as the testator or intestate, must resort to the same mode of determining the lease, and give a regular notice to quit.<sup>1</sup> 3d. By efflux of time, where the lease is for a certain definite term; 4th. By notice to quit; 5th. By forfeiture, or entry of the lessor; 6th. By merger; 7th. By surrender.

EXPIRATION OF THE LEASE BY ITS OWN LIMITATION, AND  
HOLDING OVER.

§ 934. Where the tenant holds for a fixed and limited period, or until a certain event occurs,<sup>2</sup> the occurrence of the event, or the passing of the time, determines the lease, and the landlord may take possession of the premises without giving any notice

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<sup>1</sup> Parker, d. Walker *v.* Constable, 3 Wils. R. 25; Doe, d. Shore *v.* Porter, 3 T. R. 13; Rex *v.* Inhab. of Stone, 6 T. R. 295.

<sup>2</sup> Cobb *v.* Stokes, 8 East, R. 358; Messenger *v.* Armstrong, 1 T. R. 54; Lesley *v.* Randolph, 4 Rawle, R. 126; Doe, d. Waithman *v.* Miles, 1 Stark. R. 181.

to the tenant to quit.<sup>1</sup> But if the tenant still continue to hold over after the end of the term, without any new agreement, the landlord may at his election treat him either as a trespasser, or as a tenant holding under the terms of the original lease.<sup>2</sup> Distaining for rent by the landlord after the expiration of the term is construed as an election to hold the lessee as his tenant.<sup>3</sup> The tenant, in holding over, cannot deny his relation of tenancy, without the assent of the landlord. And although, before the expiration of the term, he communicate to the landlord his determination not to keep the premises after the term, yet if he still hold over the possession, the landlord may treat him as a tenant.<sup>4</sup> One tenant cannot, however, bind his co-tenant by holding over, without consent of the latter, but renders himself solely responsible for rent.<sup>5</sup>

## NOTICE TO QUIT.

§ 934 a. We have seen, that notice to quit is unnecessary where the lease has expired by its own limitation.<sup>6</sup> But where, in such case, the landlord receives rent, he impliedly acknowledges a continuation of the tenancy, and must give notice to quit.<sup>7</sup> So, also, it is unnecessary to give notice where the relation of landlord and tenant is not created. As if a party ob-

<sup>1</sup> *Overdeer v. Lewis*, 1 Watts & Serg. R. 90; *Hollis v. Pool*, 3 Metcalf, R. 350.

<sup>2</sup> *Hemphill v. Flynn*, 2 Barr, R. 144; *Conway v. Starkweather*, 1 Denio, R. 113; *Webber v. Shearman*, 3 Hill, R. 547; *Phillips v. Monges*, 4 Whart. R. 226; *De Young v. Buchanan*, 10 Gill & Johns. R. 149; *Dorrell v. Jonson*, 17 Pick. R. 263; *Allen v. Jaquish*, 21 Wend. R. 628; *Clapp v. Paine*, 6 Shepley, R. 264.

<sup>3</sup> *Conway v. Starkweather*, 1 Denio, R. 113; *Prindle v. Anderson*, 19 Wend. R. 391; s. c. 21 Wend. R. 616.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Draper v. Crofts*, 15 Mees. & Welsb. R. 166; *Tancred v. Christy*, 12 Mees. & Welsb. R. 316; *Christy v. Tancred*, 9 Mees. & Welsb. R. 438.

<sup>6</sup> *Ante*, § 934.

<sup>7</sup> *Doe, d. Clarke v. Smaridge*, 7 Adolph. & Ell. R. (n. s.) 957.

tain possession of the premises, without the knowledge or consent of the owner thereof;<sup>1</sup> or if the landlord being tenant for life, die, and the premises become the property of the remainder-man.<sup>2</sup> So, also, notice need not be given where the tenancy is merely a tenancy at sufferance. So, also, where a tenant has attorned to any other person, or has done any act disclaiming his tenancy, or disavowing the rights of his landlord, he may be treated as a trespasser, and ousted without notice to quit.<sup>3</sup> Thus, if he get up a title hostile to that of his landlord, or if he assist another to set up such a claim, it is a forfeiture of his term.<sup>4</sup> But such a disclaimer must amount to a direct disavowal of the relation of landlord and tenant, or a distinct assertion of a right or claim incompatible with such a relation, or it will not obviate the necessity of the notice.<sup>5</sup> Thus, a mere refusal to pay rent,<sup>6</sup> or to acknowledge a particular person as landlord, until further information be given, that he is actually so;<sup>7</sup> or the mere payment of rent to a third person,<sup>8</sup> unaccompanied with any assertion affecting the right of the landlord, would not be a sufficient disclaimer to render a notice to quit unnecessary.

§ 935. The tenant may, also, determine the lease, by giving

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<sup>1</sup> Doe *v.* Quigley, 2 Camp. R. 505.

<sup>2</sup> Right *v.* Bawden, 3 East, R. 260; Doe *v.* Prideaux, 165.

<sup>3</sup> Throgmorton *v.* Whelpdale, Bull. N. P. R. 96; Doe *v.* Pasquali, Peaks, R. 196; Bower *v.* Major, 1 B. & B. R. 4. For a definition of *disclaimer*, see Doe d. Ellerbrook *v.* Flynn, 1 Cromp. Mees. & Rosc. R. 137; Williams *v.* Cooper, 1 Scott, N. R. 36; 1 Man. & Gr. R. 135; Tuttle *v.* Reynolds, 1 Vermont, R. 80.

<sup>4</sup> Doe, d. Ellerbrook *v.* Flynn, 1 Cromp. Mees. & Rosc. R. 137.

<sup>5</sup> Doe, d. Calvert *v.* Frowd, 1 Moore & Payne, R. 480; s. c. 4 Bing. R. 557; Doe, d. Cheese *v.* Creed, 2 Moore & Payne, R. 648; s. c. 5 Bing. R. 327; Doe, d. Clun *v.* Clarke, Ad. C. 239; Doe, d. Grubb *v.* Grubb, 10 B. & C. R. 816.

<sup>6</sup> Doe, d. Gray *v.* Stanion, 1 Mees. & Welsb. R. 703.

<sup>7</sup> Doe, d. Lewis *v.* Cawdor, 1 Cromp. Mees. & Rosc. R. 398.

<sup>8</sup> Doe, d. Dillon *v.* Parker, Gow. R. 180.

proper notice to the landlord of his intention to quit. But notice is unnecessary on the part of the tenant, if the landlord accept another person as tenant in his stead;<sup>1</sup> or do any act amounting to an assent to the determination of the tenancy.<sup>2</sup> Such act should be unequivocal, however, and if it can be otherwise explained, the landlord will not be considered as determining the lease.<sup>3</sup>

§ 936. Under a mortgage deed, containing the usual proviso for the enjoyment of the land by the mortgagor, until default of payment, the mortgagor may be considered as tenant for years, while in possession, before default.<sup>4</sup> But after default, unless there be a new agreement, he resembles a tenant at sufferance, and is not entitled to notice to quit.<sup>5</sup> If, however, the mortgage deed contain no agreement in regard to the mortgagor reclaiming possession, and he actually occupy the premises, he would be a tenant strictly at will.<sup>6</sup> So, also, if the tenancy be created after the mortgage, without the privity of the mortgagee, the tenant of the mortgagor can be ejected by the mortgagee without notice,<sup>7</sup> unless the mortgagee recognize the tenant, or encourage him to lay out money on the premises;<sup>8</sup> but if it be created before the mortgage, the tenant is entitled to notice from the mortgagee.<sup>9</sup>

§ 937. Where the premises are leased for years, determin-

<sup>1</sup> Sparrow *v.* Hawkes, 2 Esp. N. P. C. R. 504.

<sup>2</sup> Whitehead *v.* Clifford, 5 Taunt. R. 518.

<sup>3</sup> Redpath *v.* Roberts, 3 Esp. R. 225; Mills *v.* Bottomley, Selw. N. P. R. 1289.

<sup>4</sup> Powsley *v.* Blackman, Cro. Jac. R. 655; Doe, d. Fisher *v.* Giles, 5 Bing. R. 421.

<sup>5</sup> Doe, d. Fisher *v.* Giles, 5 Bing. R. 421; Doe, d. Garrod *v.* Olley, 12 Adolph. & Ell. R. 481.

<sup>6</sup> Keech *v.* Hall, 1 Doug. R. 22.

<sup>7</sup> Thunder, dem. Weaver *v.* Belcher, 3 East, R. 449.

<sup>8</sup> Keech *v.* Hall, 1 Doug. R. 22.

<sup>9</sup> Birch *v.* Wright, 1 T. R. 380.

able previously to the regular expiration of the lease, as in the case of a lease for twenty-one years, determinable at the end of three years, a notice to quit is necessary in order to determine the lease. A tenancy for years can only be determined by a half year's (not six months) notice to quit, ending at the expiration of the current year.<sup>1</sup> For if the notice be given for less than a half year, previous to the end of the year, a new term will have been entered upon before the expiration of the six months, during which the tenant is entitled to notice; and if it be given more than a half year previous, it will be bad, because neither party can determine the tenancy before the end of the year.<sup>2</sup> The tenant for years cannot, however, determine the lease by giving notice and quitting the premises, upon a breach of covenant by the landlord to repair, even although the premises be destroyed by fire;<sup>3</sup> unless, indeed, the covenant be in the nature of a condition precedent.<sup>4</sup>

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<sup>1</sup> *Johnstone v. Hudleston*, 4 B. & C. R. 932; *Gulliver, d. Tasker v. Burr*, Bl. R. 596; *Right, d. Flower v. Darby*, 1 T. R. 159; *Hewitt v. Adams*, 7 Bro. P. C. R. 64; *Doe v. Johnston*, 1 M'Clel. & Y. R. 141; *Richardson v. Langridge*, 4 Taunt. R. 128; *Bessell v. Landsberg*, 7 Adolph. & Ell. N. S. R. 638; *Doe v. Matthews*, 20 Eng. Law & Eq. R. 295.

<sup>2</sup> The statutes in the different States in this country, regulate the notice which is necessary to determine a tenancy at will, or from year to year. The English rule, stated in the text, prevails in New York, Vermont, Kentucky, and Tennessee. See *Jackson v. Bryan*, 1 Johns. R. 322; *Henchett v. Whitney*, 1 Verm. R. 311; *Hoggins v. Becroft*, 1 Dana, R. 30; *Trousdale v. Darnell*, 6 Yerg. R. 431; 4 Kent, Comm. R. 112. In Pennsylvania, the time of notice is three months. *Logan v. Herron*, 8 Serg. & R. 459. So, also, in Indiana, Ind. Rev. L. 518. In Maine, notice must be given in reasonable time, 1 Shepley, R. 209, Id. 216. In Massachusetts, three months are allowed, and if the tenant refuse to pay rent, fourteen days' notice in writing, is sufficient. Mass. Rev. Stat. tit. 1, c. 60, § 26. See, also, *Ellis v. Paige*, 1 Pick. R. 43; *Coffin v. Lunt*, 2 Pick. R. 71; *Suavage v. Dupuis*, 3 Taunt. R. 410.

<sup>3</sup> *Izon v. Gorton*, 7 Scott, R. 537; *Surplice v. Farnsworth*, 7 Man. & Grang. R. 577.

<sup>4</sup> *Salisbury v. Marshall*, 4 Car. & Payne, R. 65.

§ 938. Where the tenancy is for less than a year, as in the case of weekly or monthly tenancies of lodgings, or furnished apartments, a notice to quit is unnecessary; unless there be an express agreement providing for such notice; or unless the usage render it necessary.<sup>1</sup> But where notice is requisite, and the time of the notice is not fixed, it must be equal to the term. Thus, if lodgings be taken by the week, a week's notice is necessary; if they be taken by the month, a month's notice is necessary.<sup>2</sup> If, however, the lodgings be kept beyond the term for which they are let, a new term commences, for which the tenant is bound to pay full rent, whether he occupy them during the whole term or not.<sup>3</sup> A tenant of lodgings is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent, if notice be required in order to determine the tenancy.<sup>4</sup> Nor can he quit, upon the destruction of the premises by fire, unless there be an express provision in the lease, enabling him so to do.<sup>5</sup>

## FORM OF NOTICE.

§ 939. A notice may be either verbal or in writing; unless, by the terms of the demise, a written notice be required,<sup>6</sup> or unless a power requires a party to determine a tenancy by

<sup>1</sup> *Huffell v. Armistead*, 7 Car. & P. R. 56.

<sup>2</sup> *Doe, d. Parry v. Hazell*, 1 Esp. R. 94; *Doe, d. Campbell v. Scott*, 4 M. & P. R. 20; *s. c.* 6 Bing. R. 362; *Coffin v. Lunt*, 2 Pick. R. 72; *Wilson v. Abbott*, 3 B. & C. R. 89; *Prindle v. Anderson*, 19 Wend. R. 391. And see *Prescott v. Elm*, 7 Cush. R. 346.

<sup>3</sup> *Huffell v. Armistead*, 7 C. & P. R. 56.

<sup>4</sup> *Rickett v. Tullick*, 6 C. & P. R. 66.

<sup>5</sup> *Izon v. Gorton*, 7 Scott, R. 537; *Ante*, § 951a; *Stockwell v. Hunter*, 11 Metcalf, R. 448.

<sup>6</sup> *Doe, d. Ld. Macartney v. Crick*, 5 Esp. R. 196; *Doe, d. Huddleston v. Johnston*, 1 M' Clell. & Y. R. 141; *Doe, d. Dean of Rochester v. Pierce*; 2 Camp. R. 96; *Legge, d. Scott v. Benion, Willes*, R. 43.

writing.<sup>1</sup> Where several persons are jointly interested, a notice to quit, if given by them in writing, must be signed by all.<sup>2</sup> Where a notice is signed by some of several, who ought to join, a subsequent recognition of it by the rest, will not make it good by relation. But it is otherwise where the notice is given by an agent under the authority of some only, and his authority is subsequently acknowledged by the others.<sup>3</sup> But, if one of two joint-tenants give notice to quit, it will be good in respect to his share; and he may, thereupon, recover it in ejectment.<sup>4</sup> It is not, however, necessary, that the notice, if in writing, should be personally served upon the tenant; but it is sufficient if it be given to his servant at his house; and in such case, it will be good, although the tenant do not receive it within half a year of the expiration of the lease.<sup>5</sup> Where there are two or more tenants, who occupy under a joint demise, service of a written notice upon one is sufficient.<sup>6</sup> So, if one tenant live on the premises, and the other live elsewhere, service upon one upon the premises, is *prima facie* evidence that the notice reached the other.<sup>7</sup>

§ 940. The notice must be given to the immediate tenant; and a lessor cannot give notice to a sub-lessee; nor can a sub-lessee give notice to the original lessor; because there is no privity of contract between them.<sup>8</sup> But it is not necessary that a lessor should give notice to under-tenants; and if he

<sup>1</sup> Legge, d. Scott *v.* Benion, Willes, R. 43; Right, d. Fisker *v.* Cuthell, 5 East, R. 491.

<sup>2</sup> Doe, d. Joliffe *v.* Sybourn, 2 Esp. R. 677; Right, d. Fisher *v.* Cuthell, 5 East, R. 491; 5 Esp. R. 149.

<sup>3</sup> Right, d. Fisker *v.* Cuthell, 5 Esp. R. 149; Goodtitle, d. King *v.* Woodward, 3 B. & A. R. 689.

<sup>4</sup> Doe, d. Whayman *v.* Chaplin, 3 Taunt. R. 120.

<sup>5</sup> Jones, d. Griffiths *v.* Marsh, 4 T. R. 464; Doe, d. Buross *v.* Lucas, 5 Esp. R. 153; Doe, d. Neville *v.* Dunbar, 1 Mood. & Malk. R. 10.

<sup>6</sup> Doe, d. Ld. Macartney *v.* Crick, 5 Esp. R. 196.

<sup>7</sup> Doe, d. Ld. Bradford *v.* Watkins, 7 East, R. 551.

<sup>8</sup> Pleasant, Lessee of Hayton *v.* Benson, 14 East, R. 234.

give notice to his own immediate tenant, he may recover the premises in ejectment, against all the under-tenants.<sup>1</sup> Where a corporation is tenant, notice to quit must be given to the corporation, and served upon its officers.<sup>2</sup>

§ 941. The notice must be explicit and positive. It must not give the tenant an option of leaving the premises, or entering into a new contract.<sup>3</sup> But it need not be worded with the accuracy of a plea.<sup>4</sup> A notice to quit a part of the premises only is bad. The court will, however, presume, that the intention of the party is not to determine the tenancy in part, and will, if possible, give effect to the notice to determine the tenancy altogether.<sup>5</sup>

§ 942. After the landlord has given notice, and the time has expired, he may waive it by doing some act inconsistent with the supposition, that the tenancy is determined. Thus, if he receive rent after the expiration of the notice, it will operate as a waiver.<sup>6</sup> But it is a question for the jury, whether the money received be paid, *as rent*;<sup>7</sup> and it must be proved, that the rent so paid was actually received by the lessor personally, and not by his agent, without his knowledge.<sup>8</sup> Demand of rent does not *necessarily* amount to a waiver of notice. It is a question for the jury.<sup>9</sup>

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<sup>1</sup> Roe *v.* Wiggs, 5 Bos. & Pul. N. R. 330.

<sup>2</sup> Doe, dem. Earl of Carlisle *v.* Woodman, 8 East, R. 228.

<sup>3</sup> Doe, d. Matthews *v.* Jackson, Doug. R. 175; Doe, d. Price *v.* Price, 9 Bing. R. 356; s. c. 2 M. & S. R. 464.

<sup>4</sup> Doe, d. Williams *v.* Smith, 5 Ad. & Ell. R. 350.

<sup>5</sup> Doe, d. Morgan *v.* Church, 3 Camp. R. 71; Doe, d. Rodd *v.* Archer, 14 East, R. 245.

<sup>6</sup> Collins *v.* Carty, 6 Cushing, R. 415; Hunter *v.* Osterhondt, 11 Barbour, R. 33.

<sup>7</sup> Doe, d. Cheeny *v.* Batten, Cowp. R. 243; Goodright, d. Charter *v.* Cordwell, 6 T. R. 219.

<sup>8</sup> Doe, d. Ash *v.* Calvert, 2 Camp. R. 387.

<sup>9</sup> Blyth *v.* Dennett, 16 Eng. Law & Eq. R. 424.

§ 943. So, also, a notice to quit is waived by a subsequent notice, upon the ground, that the latter notice is an acknowledgment of the existence of the tenancy at the time when it is given.<sup>1</sup> But as the record notice is only a waiver of a former notice by implication, the court will not consider it as a waiver, wherever it is susceptible of a different interpretation,—as where the party expresses at the time his intention not to consider it as a waiver;<sup>2</sup> or where the second notice is given, after an ejectment is brought;<sup>3</sup> or where the notice subjects the tenant to a penalty, if he stay.<sup>4</sup>

§ 944. The notice to quit, if valid, destroys the legal right of possession by the tenant and his under-tenants, and vests it in the landlord. But in case the tenant refuse to give up the possession, the landlord must resort to the action of ejectment and cannot take the law into his own hands, and forcibly take possession. And even if the tenant leave, and lock up the premises, the landlord may not make a forcible entry.<sup>5</sup>

#### FORFEITURE.

§ 945. The relation of landlord and tenant may be dissolved by the breach of some condition, express or implied, and the reversioner's entry thereupon. But a fraudulent misrepresentation by a lessee as to a matter collateral to the lease; as that

<sup>1</sup> Doe, d. Brierly *v.* Palmer, 16 East, R. 53.

<sup>2</sup> Doe, d. Williams *v.* Humphreys, 2 East, R. 236.

<sup>3</sup> Ibid.

<sup>4</sup> Doe, d. Digby *v.* Steel, 3 Camp. R. 117; S. P. Messenger *v.* Armstrong, 1 T. R. 53.

<sup>5</sup> In Turner *v.* Meymott, 1 Bing. R. 158, it was held, that where notice had been regularly given, and the tenant refused to quit, the landlord might, in the tenant's absence, break open the door with a crowbar, and resume possession, although articles of the tenant's furniture remained in the house. But the court, also, admitted, that the landlord thereby subjected himself to an indictment, although he did not render himself answerable in an action.

he was a respectable man and intended to use the premises for a respectable business, when in fact he was not a respectable man, and intended to use and did use the premises for an immoral and illegal purpose, has been held not to avoid the lease and work a forfeiture thereof.<sup>1</sup> If the tenant acknowledge or affirm by matter of record, that the fee is in a stranger; or if he claims an estate of a higher nature than that to which he is entitled; or make a feoffment of the estate, and surrender the possession, he forfeits his lease.<sup>2</sup> These forfeitures are, however, much reduced in this country by the disuse or abolition of fines and feoffments, and by the statute provision, that no conveyance by a tenant for life, or years, of a greater estate than he could lawfully convey, should work a forfeiture, or be construed to pass a greater interest.<sup>3</sup>

## ENTRY OF THE LESSOR.

§ 945 a. The estate of a tenant at will may be determined by the entry of the lessor upon the premises for that purpose, and possession will thus be restored to him, subject to the right of the tenant to remove his property within reasonable time.<sup>4</sup> So, also, where a lease contains a provision of forfeiture, in case of non-payment of the rent, or commission of waste, or non-compliance with any other condition, without notice or process of law, the mere entry of the lessor will determine the

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<sup>1</sup> Feret *v.* Hill, 26 Eng. Law & Eq. R. 261. See, however, Canham *v.* Barry, 29 Ibid. 290.

<sup>2</sup> Read *v.* Erington, Cro. Eliz. R. 321; Fenn, d. Matthews *v.* Smart, 12 East, R. 444; Goodright, d. Walter *v.* Davids, Cowp. R. 803; Bacon, Abr. Leases, § 2.

<sup>4</sup> 4 Kent, Comm. Lect, 56, p. 106; New York Rev. Stat. Vol. 1, p. 739, § 143, 145; Mass. Rev. Stat. Part 2, tit. 1, ch. 59, § 6.

<sup>4</sup> Moore *v.* Boyd, 11 Shepley, R. 242; Curl *v.* Lowell, 19 Pick. R. 25; Dorrill *v.* Johnson, 17 Pick. R. 263. A lessor cannot enter upon the premises of a tenant at will, whose estate has not been legally determined, and remove a pump thereon standing. Dickinson *v.* Goodspeed, 8 Cush. R. 119.

lease.<sup>1</sup> But in all cases where a right of entry is reserved, the entry must be made *animo clamandi*, and for the purpose of taking possession, in order to work a forfeiture of the lease. And the mere failure of the conditions of a lease does not work a forfeiture of itself, without entry, unless it be so expressly provided.<sup>2</sup> Therefore, if a right of entry be given in case of underletting by the tenant, the assignment of the lease does not work a forfeiture, unless the entry is made.<sup>3</sup> Whether the facts constitute an entry and possession adverse to the lessor's rights, so as to work a forfeiture, is a question for a jury to determine under the circumstances of the case.<sup>4</sup> Where there is no provision in respect of notice or process of law, and the right of property is claimed on the ground of forfeiture for non-payment of the rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset, on the day when it is due, upon the land and in the most notorious place on it, even although there be no person thereon to pay.<sup>5</sup> And, although the lessor may have a right to determine a lease by entry; yet he cannot use violence in ejecting the tenant, or disallow him a reasonable time to remove without rendering himself liable to an action of trespass.<sup>6</sup>

§ 945 b. By the common law, the court has authority to stay proceedings in a writ of entry, brought to enforce a forfeiture for non-payment of rent, where such non-payment resulted from mistake or accident, and under equitable circumstances, provided the tenant bring into court the amount of

<sup>1</sup> Robie *v.* Smith, 8 Shepley, R. 114; Den *v.* Craig, 3 Green, R. 191.

<sup>2</sup> Holly *v.* Brown, 14 Conn. R. 255; Fifty Associates *v.* Howland, 11 Metcalf, R. 99; Garrett *v.* Scouten, 3 Denio, R. 334.

<sup>3</sup> Spear *v.* Fuller, 8 N. Hamp. R. 174.

<sup>4</sup> Holly *v.* Brown, 14 Conn. R. 255.

<sup>5</sup> Connor *v.* Bradley, 1 Howard, (U. S.) R. 211; Sperry *v.* Sperry, 8 N. Hamp. R. 477.

<sup>6</sup> Moore *v.* Boyd, 11 Shepley, R. 242; Curl *v.* Lowell, 19 Pick. R. 25; Dorell *v.* Johnson, 17 Pick. R. 263; Post, § 953.

the rent, interest, and costs, and tender them to the defendant.<sup>1</sup> Thus, where the tenant incurred the forfeiture of his term by tendering a quarter's rent, through mistake, a day or two before it was due, and omitted to pay it on the quarterday, by accident, the proceedings were stayed, upon the tender by the lessor of the full amount of the rent in arrear, with interest and costs.<sup>2</sup>

## MERGER.

§ 946. A term for years may be extinguished by merger. Merger is defined to be, "when a greater estate and a less coincide and meet in one and the same person, without any intermediate estate;"<sup>3</sup> in which case the less estate merges in the greater. Whenever, therefore, a tenant becomes possessed of a greater term than that in which he originally held; or whenever he becomes possessed of the freehold, in respect of which he is a tenant; the first estate is determined by merger. Equal estates will not, however, merge in each other; for a merger is only produced where a less estate and a greater estate, or a particular estate and the reversion, meet in the same person. Both estates must, however, generally vest in the same person in his own right. But if the lessee be an executor, and purchase the inheritance, his lease becomes merged.<sup>4</sup>

## SURRENDER.

§ 947. A term of years may, also, be determined by a surrender. Surrender is the yielding up of an estate for life, or

<sup>1</sup> Atkins *v.* Chilson, 11 Metcalf, R. 112.

<sup>2</sup> Ibid.

<sup>3</sup> 2 Black. Comm. p. 177.

<sup>4</sup> 4 Kent, Comm. Lect. 56, p. 99; 2 Blackstone's Comm. R. 177; Co. Litt. 338, b; 1 Rol. Abr. 934, l. 16; Platt *v.* Sleap, Cro. Jac. R. 275; s. c. 1 Bulst.

years, to him that hath the next immediate estate in reversion or remainder; whereby the lesser estate is drowned by mutual agreement;<sup>1</sup> or, generally, it is the restoration of an estate to him, who has the superior title.

§ 948. The third section of the Statute of Frauds,<sup>2</sup> enacts, "that no leases, estates, or interest, either of freehold, or term of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be *assigned, granted, or surrendered*, unless it be by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto, lawfully authorized by writing, or by act and operation of law."

§ 949. It will be observed, that the exception allowed in favor of parol leases for less than three years does not obtain in favor of assignments, grants, or surrenders; and that the statute absolutely requires, that an assignment, grant, or surrender be in all cases in *writing*. Where a parol assignment, therefore, was made of a lease from year to year, which had been granted by parol, it was held to be void under the statute.<sup>3</sup> It is not, however, necessary, that an assignment should be by deed.<sup>4</sup>

§ 950. Under the statute, a mere executory agreement, in writing, to surrender, which is not acted upon by both parties, will not determine the tenancy.<sup>5</sup> But if, pursuant to such

R. 118; Bac. Abr. Leases, R.; James v. Plant, 4 Adolph. & El. R. 749. See 3 Preston on Conveyancing, and Bissett on Life-Estates, titles Merger, Severalty.

<sup>1</sup> Co. Litt. 337, b.

<sup>2</sup> 29 Car. 11, ch. 3, § 1.

<sup>3</sup> Botting v. Martin, 1 Camp. R. 318; Preece v. Corrie, 5 Bing. R. 25.

<sup>4</sup> Farmer, d. Earl v. Rogers, 2 Wils. R. 26; Beck, d. Fry v. Phillips, 5 Burr. R. 2827; Poultney v. Holmes, 1 Str. R. 405. But in Harker v. Birkbeck, Burr. R. 1556, Lord Mansfield said, that "an assignment must be by deed."

<sup>5</sup> Doe, d. Huddleston v. Johnstone, 1 McLel. & Y. R. 141; Johnstone v.

agreement, the parties do acts inconsistent with the tenancy, the new agreement operates as a surrender. Thus, if in pursuance of an agreement to surrender, the landlord take possession, and occupy the premises, the tenancy is thereby determined.<sup>1</sup> The erasure, or cancellation of a lease will not, however, operate as an extinguishment of the estate, without a written surrender.<sup>2</sup> So, where a lessee for years conveys his leasehold interest to his lessor, who is owner of the fee, by an instrument in the form of the lease which he received, the instrument will operate as a surrender of the lease.<sup>3</sup>

§ 951. The statute allows a surrender, however, not only in writing, but "by act and operation of law." A surrender in law is a surrender, which is implied from the acts of the parties, whenever they are so inconsistent with the relation of landlord and tenant as manifestly to indicate an intention on both sides to determine it. As, where a lessee for a certain term accepts a lease for a different or shorter term;<sup>4</sup> or where both parties actually substitute, by agreement, another tenant.<sup>5</sup>

Huddlestone, 4 B. & C. R. 922; 7 D. & R. 411; Coupland *v.* Maynard, 12 East, R. 134.

<sup>1</sup> Hamerton *v.* Stead, 3 B. & C. R. 478; Williams *v.* Sawyer, 3 Brod. & Bing. R. 70; Parmenter *v.* Webber, 2 Moore, R. 656; Livingston *v.* Potts, 16 Johns. R. 28.

<sup>2</sup> Miller *v.* Manwaring, Cro. Car. R. 399; Roe, d. Earle of Berkeley *v.* Arch. of York, 6 East, R. 86; Doe, d. Courtail *v.* Thomas, 9 B. & C. R. 288; Magennis *v.* McCullough, Gilb. Eq. Cas. R. 236; Wooley *v.* Gregory, 2 Y. & J. R. 536.

<sup>3</sup> Shepard *v.* Spaulding, 4 Metcalf, R. 416.

<sup>4</sup> Bernard *v.* Bonner, Aleyn, R. 59; Whitley *v.* Gough, Dyer, R. 140, b; Ive *v.* Sams, Cro. Eliz. R. 522; s. c. 5 Rep. 11; Gybson *v.* Searls, Cro. Jac. R. 84; Hildreth *v.* Conant, 10 Metcalf, R. 298; Kelly *v.* Waite, 12 Metcalf, R. 300; Smith *v.* Niver, 2 Barb. (Sup. Ct.) R. 180.

<sup>5</sup> Bailey *v.* Delaplaine, 1 Sandf. (Sup. Ct.) R. 5; Nicholls *v.* Atherstone, 11 Jur. (Eng.) R. 778; 10 Q. B. Rep. 944; Stone *v.* Whiting, 2 Stark. R. 235; Mollett *v.* Brayne, 2 Camp. R. 103; Simers *v.* Saltus, 3 Denio, R. 214; Thomas *v.* Cook, 2 B. & Ald. R. 119; Hesseltine *v.* Seavey, 4 Shepley, R. 212; Whitney *v.* Meyers, 1 Duer, R. 266.

The express consent, however, of all the parties is necessary to create a surrender at law. And the acts done must be unequivocal; for if they be susceptible of an explanation at variance with the intention of surrendering the lease, they will not be considered as a surrender.<sup>1</sup> Thus, if the landlord put up a bill in the window of premises, signifying that they are to be let, after the tenant has quitted without notice, it will not be considered as an act implying a surrender; because it is easily explicable upon a different supposition; for the letting might be for the benefit of the lessee.<sup>2</sup> So, also, if during a letting from year to year, the landlord, with his tenant's consent, accept and treat a third person as his own tenant, it amounts to a surrender, in law, of the original tenant's interest.<sup>3</sup> But it must be a clear case of substitution, and *merger* of the old tenant's interest; and merely taking rent from the new occupier is not sufficient.<sup>4</sup>

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<sup>1</sup> Greider's Appeal, 5 Barr, R. 422; Doe, d. Egrement v. Courtney, 12 Jurist. (Eq.) R. 454; Creagh v. Blood, 3 Jones & Lat. (Eq.) R. 133.

<sup>2</sup> Redpath v. Roberts, 3 Esp. R. 225; Mills v. Bottomley, Selw. N. P. R. 1829; Marseilles v. Kerr, 6 Whart. R. 501.

<sup>3</sup> Reeve v. Bird, 1 Crompt. Mees. & Rosc. R. 31; s. c. 4 Tyrw. R. 612; Thomas v. Cook, 2 Barn. & Ald. R. 119; Phipps v. Sculthorpe, 1 Barn. & Ald. R. 50; Walls v. Atcheson, 11 Moore, R. 379; s. c. 3 Bing. R. 462; Weddall v. Capes, 1 Mees. & Welsb. R. 50; Walker v. Richardson, 2 M. & Welsb. R. 882.

<sup>4</sup> Graham v. Whichelo, 1 Crompt. & Mees. R. 188. See McDonnell v. Pope, 13 Eng. Law & Eq. R. 11; Barlow v. Wainwright, 22 Verm. R. 88.

## CHAPTER XXXV.

## ASSIGNMENT OF THE LEASE.

§ 951 a. WHERE the lease is assigned by the tenant to a third person, he still continues liable to the lessor on all his express covenants, even though the lessor assent to the assignment and receive rent from the assignee.<sup>1</sup> In case, therefore, of failure by the assignee to pay rent, the tenant is liable therefor to the lessor in an action of covenant.<sup>2</sup> But he is said not to be liable on his implied covenants, when the lessor assents to the assignment. And such assent is implied from the fact, that the lessor accepts rent from the assignee, or recognizes him as his tenant by any other act.<sup>3</sup> The assignee on his part is not only liable to the tenant, but also to

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<sup>1</sup> Shaw *v.* Partridge, 17 Verm. R. 626; Walton *v.* Cronly, 14 Wend. R. 63; Barnard *v.* Godscall, Cro. Jac. R. 309; Arthur *v.* Vanderplank, 7 Mod. R. 198; Brown *v.* Hore, Cro. Eliz. 617, 633, 637; Buckland *v.* Hall, 8 Ves. R. 95; Glover *v.* Wilson, 2 Barb. (Sup. Ct.) R. 264. An assignment of a lease by a tenant *at will*, does not terminate the tenancy unless notice be given to the landlord. Pinhorn *v.* Sonster, 20 Eng. Law & Eq. R. 501. And a conveyance to a third party by the lessor of premises leased *at will*, does not, *ipso facto* terminate the tenancy until the tenant has reasonable notice to leave.

<sup>2</sup> Ibid.

<sup>3</sup> Mills *v.* Auriol, 4 T. R. 98; Wadham *v.* Marton, 8 East, R. 316; Withy *v.* Mumford, 5 Cowen, R. 137.

the original lessor on all covenants real annexed to the estate and running along with it, and for all express covenants in the lease; except where the breach has happened before his interest accrued.<sup>1</sup> And the lessor on his part is liable to the assignee (when he accepts him as tenant) on all his express covenants; as for quiet enjoyment,<sup>2</sup> or further assurance,<sup>3</sup> or to renew the lease,<sup>4</sup> or to repair the premises; and all other covenants running with the land.<sup>5</sup>

§ 951 b. An assignee of the lessor's reversion also occupies the same position as the lessor, and has the same rights, duties, and liabilities to the lessee and lessee's assignee, as if he had given a new lease at the time of the assignment.<sup>6</sup> For all breaches of covenant previously made he is not liable, nor can he sue for rent accruing and due before his assignment,<sup>7</sup> even although it be granted by the lessor to the assignee.<sup>8</sup> But in respect to all subsequent rights and liabilities, he is

<sup>1</sup> *Howland v. Coffin*, 12 Pick. R. 125; *Whitby v. Mumford*, 5 Cowen, R. 137; *M'Cady v. Brisbane*, 1 Nott & McCord, R. 104; *Harper v. Fisher*, 1 Rawle, R. 155; *Cro. Eliz.* R. 863.

<sup>2</sup> *Noke v. Awder*, *Cro. Eliz.* R. 373; *Campbell v. Lewis*, 3 Barn. & Ald. R. 392.

<sup>3</sup> *Middlemore v. Goodale*, *Cro. Car.* R. 503; *King v. Jones*, 5 Taunt. R. 418.

<sup>4</sup> *Vernon v. Smith*, 5 Barn. & Ald. R. 1, 11; *Sacheverell v. Froggatt*, 2 Saund. R. 370; *Glover v. Wilson*, 2 Barb. (Sup. Ct.) R. 264; *Roe*, lessee of *Bamford v. Hayley*, 12 East, R. 469; *Kearney v. Post*, 1 Sand. (Sup. Ct.) R. 105.

<sup>5</sup> *Ibid.* Spencer's case, 5 Rep. R. 16; *Lloyd v. Cozens*, 2 Ashmead, R. 131.

<sup>6</sup> *Howland v. Coffin*, 12 Pick. R. 125; *M'Cady v. Brisbane*, 1 Nott & McCord, R. 104; *Miles v. St. Mary's Church*, 1 Whart. R. 229. The Statute of 32 Henry VIII. ch. 39, enacts this rule in England, and it is adopted generally in this country.

<sup>7</sup> *Burden v. Thayer*, 3 Metcalf, R. 76; *Willard v. Tillman*, 2 Hill, R. 274; *Snyder v. Riley*, 1 Speers, R. 272; *Allen v. Bryant*, 5 Barn. & Cres. R. 512.

<sup>8</sup> *Burden v. Thayer*, 3 Metcalf, R. 76.

the lessor, and his assignor's powers and responsibilities are gone.<sup>1</sup>

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<sup>1</sup> *Beeby v. Parry*, 3 Lev. R. 154; *Stains v. Morris*, 1 Ves. & Beames, R. 8, 11; *Pember v. Matthews*, 1 Bro. Ch. R. 52; *Armstrong v. Wheeler*, 9 Cowen, R. 88; *City of Baltimore v. White*, 2 Gill, R. 444; *Peck v. Northrop*, 17 Conn. R. 217. See ante, § 931 *d*; *Logan v. Hall*, 11 Jurist, (Eng.) 804.

## CHAPTER XXXVI.

## RIGHTS AND LIABILITIES OF THE OUTGOING TENANT.

§ 952. AFTER the tenancy is dissolved, and the lessee has quitted possession, certain rights still remain to him, in virtue of his tenancy.

§ 953. 1st. He has a right to enter upon the premises, for the purpose of removing such of his goods and utensils as are not fixtures.<sup>1</sup> All the fixtures which he is permitted by law to remove must be taken before the termination of the tenancy;<sup>2</sup> and if he neglect so to do, he cannot afterwards enter to take them. But where a chattel has been annexed by the tenant and may without injury to the freehold be severed, it is not necessarily to be inferred from the annexation, that it becomes the property of the freeholder. This is a question for a jury, and they may infer from the evidence of use or other circumstances, an agreement that the original owner should have liberty to take it away again on the determination of the lease.<sup>3</sup>

§ 954. 2d. Whenever the term of the tenancy is indetermi-

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<sup>1</sup> Lit. § 69; 2 Black. Comm. 147; *Folsom v. Moore*, 1 Appleton R. 252.

<sup>2</sup> *Pool's Case*, 1 Salk. R. 368; *Ex parte Quincy*, 1 Atk. R. 477; *Fitzherbert v. Shaw*, 1 H. Black. R. 258; *Heap v. Barton*, 10 Eng. Law & Eq. R. 499.

<sup>3</sup> *Wood v. Hewett*, 8 Adolph. & Ell. R. (N. S.) 914; *Rex v. Otley*, 1 Barn. & Adolph. R. 161. As to what a tenant may remove, see ante, § 918.

nate and uncertain, the tenant is entitled to emblements, unless he determine the tenancy by his own act. But if the term be certain and definite, he is not.<sup>1</sup> Emblements are those annual products of the land which are grown by the labor of the tenant. Whatever either grows spontaneously, or is not of an annual growth and decay, as trees, grass, fruit, is not included in the term emblements.<sup>2</sup>

§ 955. A tenant from year to year, therefore, is entitled to emblements, but a tenant for a year certain is not.<sup>3</sup> So, also, where the tenancy is determinable upon the occurrence of some future contingent event, the tenant will be entitled to emblements.<sup>4</sup>

§ 956. Whenever the tenancy is determined by, 1st. The act of God,—as by death; or, 2d. By act of law,—as if a lease be made to husband and wife during coverture, and they be divorced; or, 3d. By the act of the lessor,—as by his giving notice to quit,—the tenant may enter and take the emblements. But if the tenancy be determined by the lessee, as if, he being tenant at will, determine the will; or if he be guilty of a breach of condition, he has no right to emblements.<sup>5</sup>

§ 957. The tenant will be entitled to *away-going* crops, that is, to crops sown during the last year of the tenancy, which are unripe when the term expires. This right, unlike that of

<sup>1</sup> Co. Litt. 55, b; Knevett *v.* Pool, Cro. Eliz. R. 463; Davis *v.* Conop, 1 Prince, R. 53.

<sup>2</sup> Co. Litt. 550; 1 Rol. Abr. 728, l. 1; Latham *v.* Atwood, Cro. Car. R. 515; 2 Black. Comm. 123.

<sup>3</sup> Kingsbury *v.* Collins, 12 Moore, R. 424; s. c. 4 Bing. R. 202; 2 Black. Comm. 123, 404; Chandler *v.* Thurston, 10 Pick. R. 209; 4 Kent, Lect. 56, p. 109; 1 Hill, Abr. 9, 10, 183; Whitmarsh *v.* Cutting, 10 Johns. R. 361.

<sup>4</sup> Co. Litt. 55, b; Knevett *v.* Pool, Cro. Eliz. R. 463.

<sup>5</sup> 1 Roll. Abr. 728, l. 1; Latham *v.* Atwood, Cro. Car. R. 515; 2 Black. Comm. 123; Lit. § 69.

the tenant to emblements, exists in respect to all estates, whether determinate or indeterminate. It is founded, however, either in the express contract of the parties, or is implied from the custom or usage of the country or neighborhood; and in the absence of any such express or implied contract, does not exist.<sup>1</sup> The manner in which the tenant shall enter, and the nature and extent of his possession during the necessary time consumed by him in reaping, and removing the harvest, is determined by the terms of the express contract; or, in the absence of any contract in relation thereto, by the custom and usage of the neighborhood, which the tenant is bound to prove.<sup>2</sup> The tenant, in such case, however, can never have more than an easement, sufficient to enable him properly to cultivate, reap, and remove the crop; and he will, in no case, be entitled to an adverse possession. The tenant is, also, allowed, if such be the custom, to leave his away-going crops in the barns, for a reasonable time, for the purpose of threshing.<sup>3</sup> Unless, however, there be an express contract in regard to manure on a farm, the outgoing tenant cannot take it.<sup>4</sup> But where it is made in a livery-stable, or in manner not connected with agriculture, or in the course of husbandry, the tenant may take it.<sup>5</sup>

§ 958. The right, also, of the tenant to be remunerated for tillage, or cultivation of arable land, which is to enure solely to the benefit of his successor, and the right to carry away straw and hay, grown upon the land, or to be paid therefor,

<sup>1</sup> *Wigglesworth v. Dalison*, 1 Doug. R. 201, affirmed in error; 1 Doug. R. 12, 207, note 8; *Chandler v. Thurston*, 10 Pick. R. 210; *Stewart v. Doughty*, 9 Johns. R. 108.

<sup>2</sup> *Wigglesworth v. Dallison*, 1 Doug. R. 291; s. c. 1 Doug. R. 207, note 8; *Caldecott v. Smythies*, 7 Car. & Payne, R. 808; *Strickland v. Maxwell*, 2 Cromp. & Mees. R. 539; s. c. 4 Tyr. R. 346.

<sup>3</sup> *Beavan v. Dalahay*, 1 H. Bl. R. 5; 2 Abr. Customs, b.

<sup>4</sup> *Lassell v. Reed*, 6 Greenl. R. 222; *Staples v. Emery*, 7 Greenl. R. 204; *Daniels v. Pond*, 21 Pick. R. 367; *Lewis v. Lyman*, 22 Pick. R. 442; *Gough v. Howard*, Peake's Ad. Cases, 197; *Ex parte Nixon*, 1 Rose, B. C. R. 445.

<sup>5</sup> *Daniels v. Pond*, 21 Pick. R. 367.

depend upon custom;<sup>1</sup> and usage and custom constitute the rule in all cases, where there is no express agreement providing therefor, or directly inconsistent therewith.<sup>2</sup>

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<sup>1</sup> *Dalby v. Hirst*, 1 B. & B. R. 224; s. c. 3 *Moore*, R. 536; *Woodf. by Har-*  
*rison*, 526; *Smith v. Chance*, 2 B. & Ald. R. 753; *Hutton v. Warren*, 1 *Mees.*  
*& W. R.* 477.

<sup>2</sup> *Holding v. Pigott*, 5 M. & P. R. 427; s. c. 7 *Bing. R.* 465.

## CHAPTER XXXVII.

## ACTION OF ASSUMPSIT FOR USE AND OCCUPATION.

§ 959. THE landlord's remedy by this action for rent is, by common law, upon the demise. It is a matter savoring of the realty, for which debt or covenant is the proper remedy; and assumpsit will not lie where rent is reserved by deed; unless there be an express promise to pay the rent after the expiration of the term, upon some new consideration. As, where there is a promise to pay the balance due on the settlement of an account, including rent in arrear.<sup>1</sup> This rule obtains upon the ground that the action of assumpsit will not lie where there is a remedy of a higher nature.<sup>2</sup>

§ 960. But where a demise is not under seal, the statute of 11 Geo. II. ch. 19, § 14, provides a remedy for the recovery of rent, by action of *assumpsit* for use and occupation. So, also, by common law, an action of *assumpsit* for use and occupation of land, by permission and assent of the plaintiff, lies on an express or implied promise to pay a certain sum, or, in general, to pay to the plaintiff's satisfaction for such use.<sup>3</sup> This

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<sup>1</sup> Foster *v.* Allanson, 2 T. R. 479; Reade *v.* Johnson, Cro. Eliz. R. 242; Ibid. 859; Codman *v.* Jenkins, 14 Mass. R. 95; Comyn, Landlord and Tenant, 435 and cases there cited.

<sup>2</sup> Naish *v.* Tatlock, 2 H. Bl. 323; Codman *v.* Jenkins, 14 Mass. R. 95.

<sup>3</sup> Eppes *v.* Cole, 4 Hen. & Munf. R. 161; Sutton *v.* Mandeville, 1 Munf. R. 407; Gunn *v.* Scyvil, 4 Day, R. 229, 234; Osgood *v.* Dewey, 13 Johns. R. 240; Stockett *v.* Watkins, 2 Gill & Johns. R. 326.

action must, however, be founded on a promise to pay rent, either express or implied ; and if the contract be inconsistent with such a supposition, and at variance with such an intention, the action will not lie.<sup>1</sup> Thus, if a purchaser take possession of premises under a contract to purchase, and advance the purchase-money, and the purchase be not completed on account of the inability of the vendor to make a title, the vendor cannot charge the vendee with rent for the time during which he remained in possession, upon an implied contract for use and occupation ; for a contract cannot arise by implication of law, under circumstances, the occurrence of which neither of the parties ever contemplated.<sup>2</sup> So, also, this action cannot be maintained against a *bonâ fide* purchaser for a valuable consideration from the heirs of a disseizor after a descent cast, and without notice of the disseisin.<sup>3</sup>

§ 961. An actual personal possession is not, however, necessary to support this action, where there is a written contract of demise, for a term not exceeding three years ; for the tenant "holds" although he does not occupy ; and if there be an actual *holding* and the power to occupy and enjoy be given by the landlord to the tenant as far as depends on the landlord, the action for use and occupation is maintainable ;<sup>4</sup> although, in point of fact, the premises be wholly destroyed by fire, so that no actual occupation is possible ; and although the lease be of rooms, or particular floors in a house, so that no interest in the land can survive to the tenant after the

<sup>1</sup> *Boston v. Binney*, 11 Pick. R. 1; *Featherstonhaugh v. Bradshaw*, 1 Wend. R. 134; *Smith v. Stewart*, 6 Johns. R. 46.

<sup>2</sup> *Kirtland v. Pounsett*, 2 Taunt. R. 147. See, also, *Keating v. Bulkley*, 2 Stark. R. 419; *Vandenheuvel v. Storrs*, 3 Conn. R. 203; *Hough v. Birge*, 11 Verm. R. 190. But see *contra*, *Gould v. Thomson*, 4 Metcalf, R. 224.

<sup>3</sup> *Wharton v. Fitzgerald*, 3 Dall. R. 503; *Emerson v. Thompson*, 2 Pick. R. 473. And see *Smith v. Eldridge*, 26 Eng. Law & Eq. R. 285.

<sup>4</sup> *Izon v. Gorton*, 5 Bing. N. C. R. 507; *Smith v. Twoart*, 3 Scott, N. R. 174; *Surplice v. Farnsworth*, 7 Man. & Grang. R. 584, 585.

destruction by fire.<sup>1</sup> But it is otherwise, if there be no written contract of demise, and no actual occupation or enjoyment.<sup>2</sup>

§ 962. Use and occupation lie for the whole term where the tenant quits the premises, without properly determining his term,—as by giving notice to quit; or without the assent of the lessor to his quitting the premises.<sup>3</sup> But if the landlord accept the premises, or let them to another person, he cannot recover beyond the time, during which they were actually occupied.<sup>4</sup> So, if the rent be entire, and the landlord evict the tenant during his term out of part of the premises, he may abandon the residue, and is not chargeable for the occupation of any part.<sup>5</sup> But if he still continue to occupy the residue, he is chargeable upon a *quantum meruit*.<sup>6</sup> So, also, if a tenant at will, or sufferance, renounce to title of his landlord, *assumpsit* cannot be maintained for use and occupation subsequent to such renunciation.<sup>7</sup> So, also, if a lease for a certain term contain no exception of losses by fire, and the premises be burned down, the tenant is chargeable, in an action for use and occupation for rent during the whole term.<sup>8</sup>

<sup>1</sup> *Ibid.*

<sup>2</sup> *Inman v. Stamp*, 1 Stark. N. P. C. 12; *Edge v. Strafford*, 1 Cr. & Jerv. R. 391.

<sup>3</sup> *Matthews v. Sawell*, 8 Taunt. R. 270; *Redpath v. Roberts*, 3 Esp. R. 225; *Mills v. Bottomley*, Selw. N. P. R. 1829; *Phipps v. Sculthorpe*, 1 B. & Ald. R. 50.

<sup>4</sup> *Hall v. Burgess*, 5 Barn. & Cres. R. 332; *Walls v. Atcheson*, 3 Bing. R. 462; *Whitehead v. Clifford*, 5 Taunt. R. 518; *Birch v. Wright*, 1 T. R. 378; *Marseilles v. Kerr*, 6 Whart. R. 501; *Beach v. Gray*, 2 Denio, R. 84.

<sup>5</sup> *Smith v. Raleigh*, 3 Camp. R. 513; *Pope v. Briggs*, 9 B. & C. R. 245.

<sup>6</sup> *Stokes v. Cooper*, 3 Camp. R. 513, note; *Tomlison v. Day*, 2 B. & B. R. 680.

<sup>7</sup> *Boston v. Binney*, 11 Pick. R. 1.

<sup>8</sup> *Baker v. Holtzapffel*, 4 Taunt. R. 45; *Izon v. Gorton*, 7 Scott, R. 537;

§ 962 *a.* Where a tenant occupies premises, on an agreement to pay rent therefor, but neither the time of the occupation nor the amount of the rent is agreed for, and the landlord gives him notice to quit immediately, and he assents thereto, and acts accordingly, the landlord may immediately maintain an action for use and occupation, without first demanding payment of the rent.<sup>1</sup>

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s. c. 5 Bing. R. New Cas. 501; *Ibbs v. Richardson*, 1 P. & Dav. R. 618. But see *Edwards v. Etherington*, 1 Ryan & Mood. R. 268; s. c. 7 Dowl. & Ryl. R. 117.

<sup>1</sup> *Spaulding v. M'Oske*, 7 Metcalf, R. 8.

## CHAPTER XXXVIII.

## MASTER AND SERVANT.

§ 962 b. We now propose to consider the contract of hiring and service as between master and servant.<sup>1</sup> Their rights and duties as principals and agents are not peculiar, and have already been considered under the head of agency.

§ 962 c. And in the first place, as to the *term of service* for which the contract is made. Where there is a general hiring, nothing being said as to its duration, and no stipulation as to payments being made, which may govern its interpretation,—the contract is understood to be for a year,—and the reason for this rule is said to be, that both master and servant may have the benefit of all the seasons.<sup>2</sup> This rule applies to the hiring of all menial and household servants, trade servants, reporters of newspapers, servants in husbandry, &c.<sup>3</sup>

§ 962 d. But where wages are payable at a stipulated pe-

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<sup>1</sup> The reader is referred to a very clever little treatise on the "Law of Contracts for Works and Services," by David Gibbons, Esq., which has been published in London within the last year. It forms one of a series of small "rudimentary treatises" on various subjects of art and science, and in an unpretending form contains much valuable and carefully digested matter.

<sup>2</sup> Per Best. Ch. J. in Rex *v.* Macclesfield, 3 T. R. 76; Rex *v.* Newton Toney, 2 T. R. 453; Rex *v.* Seaton, Cald. R. 440; Beeston *v.* Collyer, 2 Car. & Payne, R. 609; 4 Bing. R. 309.

<sup>3</sup> Holcroft *v.* Barber, 1 Car. & Kir. R. 4; Baxter *v.* Nurse, 1 Car. & Kir. R. 10; 6 Man. & Grang. R. 941.

riod, as per week, or month, or half year, such circumstance, standing alone, indicates that the hiring is for such period.<sup>1</sup> But if there be any thing in the contract showing that the hiring was intended to be for a longer term, as for a year, the mere reservation of wages for a lesser term, as per week, or month, will not control the hiring.<sup>2</sup> Thus, where a farm servant was hired for a year, at three shillings a week, with liberty to go at a fortnight's notice, it was held to be a hiring for a year, the fortnight's notice plainly showing that it was not a weekly hiring.<sup>3</sup> So, also, where the plaintiff was engaged as editor of a review, at three guineas a week, with a progressive increase of salary according to the sale of the review, and a custom was made out by which the engagements of editors to newspapers were considered as annual engagements, unless otherwise expressed, the question was left to the jury, and they having found a verdict, that the engagement was not for a year's service, but only for a weekly service, the court refused to disturb the verdict, on the ground that the general rule, that contracts of hiring were for a year when no definite arrangement of time was made, only created a presumption, which could be rebutted by the circumstances of the case.<sup>4</sup>

§ 962 e. Again, although a power of defeasance by either

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<sup>1</sup> *Rex v. Newton Toney*, 2 T. R. 453, per Buller, J.; *Rex v. Odiham*, 2 T. R. 622; *Rex v. St. Mary, Lambeth*, 4 Maule & Selw. R. 315; *Rex v. Pucklechurch*, 5 East, R. 884; *Bayley v. Rimmel*, 1 Mees. & Welsb. R. 507; *Baxter v. Nurse*, 7 Scott, N. R. 801.

<sup>2</sup> *Fawcett v. Cash*, 5 Barn. & Adolph. R. 908; *Rex v. Hampreston*, 5 T. R. 205; *Rex v. Great Yarmouth*, 5 Maule & Selw. R. 114; *Rex v. Newton Toney*, 2 T. R. 453; *Rex v. St. Andrew in Pershore*, 8 Barn. & Cres. R. 679; *Callow v. Brouncker*, 4 Car. & Payne, R. 518; *Giraud v. Richmond*, 2 Man. Grang. & Scott, R. 835; *Reab v. Moor*, 19 Johns. R. 337; *Davis v. Maxwell*, 12 Met. R. 286.

<sup>3</sup> *Rex v. Birdbrook*, 4 T. R. 245.

<sup>4</sup> *Baxter v. Nurse*, 1 Car. & Kir. R. 10; 6 Man. & Grang. R. 935; *Holcroft v. Barber*, 1 Car. & Kir. R. 4.

party at a certain notice be given, either by custom or agreement, or although the contract be made defeasible on the happening of a certain event, the hiring may, nevertheless, be a yearly hiring, unless that power be exercised, or the contingency happen and be acted on, so as to give a settlement under the poor-laws.<sup>1</sup>

§ 962*f.* The following contracts have been held to be hirings for the week. The hiring of a gardener, "at 6*s.* a week for the winter, and 9*s.* a week for the summer;"<sup>2</sup> of a maid-servant, "at 1*s.* 4*d.* a week, and board and lodging, for as long as they wanted a servant;"<sup>3</sup> and of an assistant plumber and glazier, "at 6*s.* a week wages, board, lodging, and washing, summer and winter." In respect to such cases it has been said: "The mere arrangement that the wages shall be at one rate in the summer, and at another in the winter, does not show that the parties contemplated a service to endure through the summer and the winter, and, therefore, that they intended a hiring for a year; but shows, only, that they intended that if the servant, being hired at weekly wages, should remain till the summer, he should then have so much per week, and if he should remain till the winter, he should then have so much per week. The true meaning of such an arrangement is merely this: that the servant's wages, as a weekly servant, are to be regulated by the season."<sup>4</sup> The question in all these cases is purely one of intention.

§ 962*g.* The presumption of a yearly hiring does not arise

<sup>1</sup> *Rex v. Sandhurst*, 7 Barn. & Cres. R. 562; *Rex v. Byker*, 8 Dowl. & Ryl. R. 336; *Rex v. The Inhab. of Birdbrooke*, 4 T. R. 246; *Rex v. Great Yarmouth*, 5 Maule & Selw. R. 114. See *Emmens v. Elderton*, 26 Eng. Law & Eq. R. 1.

<sup>2</sup> *Rex v. Rolvenden*, 1 Man. & Ry. R. 691.

<sup>3</sup> *Rex v. Elstack*, 2 Bott, R. 231, pl. 298.

<sup>4</sup> *Rex v. Rolvenden*, 1 Man. & Ry. R. 691. See, also, *Rex v. Dodderbill*, 3 Maule & Selw. R. 243; *Rex v. Lambeth*, 4 Ibid. 315.

where the service of the servant is expressed to be at the will of either party; as where a boy was hired by a farmer "for meat and clothes, so long as he had a mind to stop."<sup>1</sup> And where there is no evidence of a hiring, but occasional payments have been made by the master, not at fixed and definite periods, the hiring will be considered as at will,<sup>2</sup> if, indeed, it be considered as any hiring at all.<sup>3</sup>

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<sup>1</sup> *Rex v. Christ's Parish, York*, 3 Barn. & Cres. R. 459. See, also, *Rex v. Great Bowden*, 7 Barn. & Cres. R. 249; *Rex v. Elstack*, 2 Bott, R. 231 c, 298. As to what words will create a yearly hiring, see *Emmons v. Elderton*, 26 Eng. Law & Eq. R. 1.

<sup>2</sup> *Bayley v. Rimmell*, 1 Mees. & Welsb. R. 506.

<sup>3</sup> *Rex v. St. Matthew*, 3 T. R. 449.

## CHAPTER XXXIX.

## RIGHTS, DUTIES, AND LIABILITIES OF THE MASTER.

§ 962*h.* In the next place, as to the *rights, duties, and liabilities of the master.* When the contract is for a specific time, as if the master agrees to pay wages to the servant for a year, the master is bound to continue that relation during the whole of the year, and if he dismiss him, he is liable for a breach of the contract. In such case the measure of damages would be the entire salary for the year, unless, perhaps, the master could prove, (and upon him is the burden of proof,) that the servant had afterwards engaged in other business, and earned money therein;<sup>1</sup> or unless he prove, that employment of the same general nature and description had been offered to him and refused,— which exceptions might furnish a ground to reduce the recovery below the stipulated amount.<sup>2</sup> The servant, however, especially if he were a clerk or superintendent of a particular business, or engaged for a peculiar business, could not be required to leave his home or place of residence, and engage in a different occupation; and the general rule is in such a case, that the servant is entitled to his full wages.<sup>3</sup>

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<sup>1</sup> See Stewart *v.* Walker, 14 Penn. St. R. 293.

<sup>2</sup> Costigan *v.* The Mohawk & Hudson Railroad Co. 2 Denio, R. 612; Hoyt *v.* Wildfire, 3 Johns. R. 518; Ward *v.* Ames, 9 Johns. R. 138; Emerson *v.* Howland, 1 Mason, R. 51.

<sup>3</sup> Ibid. Beeston *v.* Collyer, 4 Bing. R. 309; Fawcett *v.* Cash, 5 Barn. & Adolph. R. 904; Williams *v.* Byrne, 7 Adolph. & Ell. R. 177; French *v.*

§ 962 *i.* Again, in the absence of any specific stipulation as to wages, the master is bound to pay to the servant the value of his services,<sup>1</sup> unless the circumstances indicate that the service was considered as gratuitous.<sup>2</sup> Thus, the presumption may arise in cases where relations, living together, perform acts of service for each other, that such acts are performed out of kindness or duty, when no reward is stipulated.<sup>3</sup> But this presumption may be controlled by the circumstances of the particular case, and if any promise of compensation appear, indicating that the service is not gratuitous, a *quantum meruit* may be recovered. Thus, where a son lived with his father, and performed service for him, with the understanding and under the representation by the father that he should be provided for by his will, it was held, that if he was not provided for by the will of the father, he could recover a reasonable compensation for his services against the executor or adminis-

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Brookes, 6 Bing. R. 354; Gaandell *v.* Pontigny, 4 Camp. R. 375; Robinson *v.* Hindman, 3 Esp. R. 235; Smith *v.* Kingsford, 3 Scott, R. 279; Smith *v.* Hayward, 7 Adolph. & Ell. R. 544; Duke of Newcastle *v.* Clark, 8 Taunt. R. 602. See post, *Damages*, § 1022 *c*; Pilkington *v.* Scott, 15 Mees. & Welsb. R. 657, affirmed in *Regina v. Welch*, 20 Eng. Law & Eq. R. 85; Elderton *v.* Emmens, 4 Man. Grang. & Scott, R. 498, in the Exchequer; 26 Eng. Law & Eq. R. 1; Hartley *v.* Cummings, 5 Man. Grang. & Scott, R. 247; s. c. 2 Car. & Kir. R. 433. But see *Aspdin v. Austin*, 5 Q. B. R. 671; *Dunn v. Sayles*, 5 Q. B. R. 685; *Williamson v. Taylor*, 5 Q. B. R. 175; *Byrd v. Boyd*, 4 McCord, R. 246.

<sup>1</sup> *Bayley v. Rimmell*, 1 Mees. & Welsb. R. 506; *Mattocks v. Lyman*, 16 Verm. R. 113.

<sup>2</sup> See *Newell v. Keith*, 11 Verm. R. 214; *Peters v. Steel*, 3 Yeates, R. 250; *Higgins v. Breen*, 9 Missouri R. 497.

<sup>3</sup> *Rex v. Sow*, 1 Barn. & Ald. R. 178; *Davies v. Davies*, 9 Car. & Payne, R. 87; *Alfred v. Fitzjames*, 3 Esp. R. 3; *Patterson v. Patterson*, 13 Johns. R. 379; *Defrance v. Austin*, 9 Barr, R. 309; *Andrus v. Foster*, 17 Verm. R. 556. See *Fitch v. Peckham*, 16 Verm. R. 150; *Weir v. Weir*, 3 B. Monroe, R. 647; *Guild v. Guild*, 15 Pick. R. 130; *Dye v. Kerr*, 15 Barbour, R. 444; *Hussey v. Roundtree*, 1 Busbec, R. 110; *Partlow v. Cooke*, 2 Rhode Island R. 451; *Resor v. Johnson*, 1 Carter, R. 100; *Leslie v. Miller*, 16 Penn. St. R. 488; *Ridgway v. English*, 2 Zabriskie, R. 409; *Lantz v. Frey*, 14 Penn. St. R. 201.

trator.<sup>1</sup> So, also, where an entire contract of service has been entered into and subsequently rescinded either by mutual consent of both parties, or by either party having a right to rescind, the servant is entitled to wages *pro rata*, or to a reasonable remuneration for his services.<sup>2</sup> Thus, where a minor ships for a whole voyage as a mariner, the contract is voidable by him on account of his minority, and if he so avoid it, as by desertion, he may recover on a *quantum meruit* for his services.<sup>3</sup>

§ 962*j.* The master cannot, without a specific agreement to such effect, deduct from the wages of the servant the value of articles injured or lost by him in the course of the service, but must bring his cross action against the servant for compensation.<sup>4</sup> Nor can he deduct therefrom any sum which he may have paid a physician, called in by himself, without the request or consent of the servant, such an act being considered as merely one of generosity.<sup>5</sup> Again, if the servant be an infant, the master can deduct from his wages such sums as he may have paid on his account or at his request for *necessaries*, but

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<sup>1</sup> Patterson *v.* Patterson, 13 Johns. R. 379; Jacobson *v.* Le Grange, 3 Johns. R. 199; Snyder *v.* Castor, 4 Yeates, R. 353; Coleman *v.* Simpson, 1 Dana, R. 166; Engleman *v.* Engleman, 1 Dana, R. 438. It is otherwise if a legacy is left such servant, for that is presumed to be in satisfaction. See Eaton *v.* Benton, 2 Hill, R. 576. See Lee *v.* Lee, 6 Gill & Johns. R. 316.

<sup>2</sup> Thomas *v.* Williams, 1 Adolph. & Ell. R. 685; Lamburn *v.* Cruden, 2 Man. & Grang. R. 253; Phillips *v.* Jones, 1 Adolph. & Ell. R. 333; Hurcum *v.* Stericker, 10 Mees. & Welsb. R. 553; Bayley *v.* Rimmell, 1 Mees. & Welsb. R. 508; Phillips *v.* Jones, 1 Adolph. & Ell. R. 333; Seaver *v.* Morse, 20 Verm. (5 Washb.) R. 620.

<sup>3</sup> Vent *v.* Osgood, 19 Pick. R. 572. But see Breed *v.* Judd, 1 Gray, R. 460.

<sup>4</sup> Le Loir *v.* Burton, 4 Camp. R. 134; Cleworth *v.* Pickford, 7 Mees. & Welsb. R. 314. But see Snell *v.* The Independence, Gilpin, R. 140; The New Phœnix, 2 Haggard, R. 420.

<sup>5</sup> Sellen *v.* Norman, 4 Car. & Payne, R. 80; Gibbons on the Law of Contracts for Works and Services, § 69; Emmons *v.* Lord, 18 Maine, R. 351.

none other.<sup>1</sup> Therefore, where a master paid for silk dresses, lace, coach fares, &c., the sum of £5 20s., it was held, that he could not deduct such sum from the wages of the servant, because they are not necessaries.<sup>2</sup> So, also, if the servant fall sick, or be disabled, during the service, the master is not entitled to make any deduction from the wages for the time during which he is thereby incapacitated from performing his work.<sup>3</sup>

§ 962 *k.* The master is not bound to provide his servant with medical attendance or medicines in case of illness. A contrary rule was, indeed, at one time declared by Lord Kenyon,<sup>4</sup> but his opinion has been overruled.<sup>5</sup> The master is, however, bound in case of illness, to furnish the servant with proper food.<sup>6</sup> And he cannot dismiss him, nor deduct his wages for the time during which he is sick.<sup>7</sup> It is even doubt-

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<sup>1</sup> See *Adams v. Woonsocket Co.* 11 Met. R. 327.

<sup>2</sup> *Hedgeley v. Holt*, 4 Car. & Payne, R. 104. In this case Bayley, J., said : “ Payments made on account of wages due to an infant for necessaries, and which could not be avoided, are valid payments ; but an infant cannot bind herself for things which are not necessary. The consequences might be very injurious if the law were otherwise. What would it lead to in this very case ? Here is a female, who is described as rather a showy woman, suffered to dress in a manner quite unfitted to her station, and at the end of her twelvemonths’ service she would not have a farthing in her pocket.” *Gibbon on Contracts for Works and Services*, § 69.

<sup>3</sup> *Rex v. Wintersett*, Cald. R. 300 ; *Rex v. Sudbrooke*, 1 Smith, R. 59 ; *Chandler v. Grieves*, 2 H. Black. R. 606 n. See *Nichols v. Coolahan*, 10 Met. R. 449 ; *Dickey v. Linscott*, 20 Maine R. 453 ; *Seaver v. Morse*, 20 Verm. R. 620 ; *Fuller v. Brown*, 11 Met. R. 440 ; *Fenton v. Clark*, 11 Verm. R. 557.

<sup>4</sup> *Scarman v. Castell*, 1 Esp. N. P. C. R. 270.

<sup>5</sup> *Wennall v. Adney*, 3 Bos. & Pul. R. 247 ; *Sellen v. Norman*, 4 Car. & Payne, R. 80 ; *Cooper v. Phillips*, 4 Car. & Payne, R. 581 ; *Regina v. Smith*, 8 Car. & Payne, R. 153 ; *Dunbar v. Williams*, 10 Johns. R. 249.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Rex v. Islip*, 1 Strange, R. 423 ; *Rex v. Christ Church, Burr.* R. 494 ; *Rex v. Sharrington*, 2 Bott, R. 322 ; *Chandler v. Grieves*, 2 H. Black. R. 606 n ; *Rex v. Sudbrook*, 1 Smith, R. 59 ; *Dalton*, c. 58.

ful, whether the insanity of the servant authorizes the master to dissolve the contract, although he might be discharged by a magistrate on application.<sup>1</sup> In this respect, the rule as to a servant would seem to be different from that which applies to an apprentice,—for in the latter case, the master is bound to provide proper medicines.<sup>2</sup>

§ 962 *l.* The master is bound to take a reasonable care of his servant, and not to expose him to a service which is dangerous. The degree of care required of him was stated by Lord Abinger to be the same, that he might reasonably be expected to take of himself; and he was said to be bound to provide for the safety of the servant, in the course of the employment, to the best of his judgment, information, and belief.<sup>3</sup> He is not, therefore, responsible for an accident happening to the servant in the course of his service,<sup>4</sup> unless he know the service to be dangerous, and the servant do not.<sup>5</sup>

§ 962 *m.* The master is not bound to give his servant a character. But if in doing so, he speak disparagingly, or state what is prejudicial to the servant, he will not be liable, unless his statement can be proved not only to be false, but ma-

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<sup>1</sup> *Rex v. Lutton*, 5 T. R. 659; *Rex v. Inhabitants of Halcott*, 6 T. R. 587. No action lies by a physician for attendance and medicine administered to a slave without the master's consent or knowledge, except in a case requiring instant and immediate assistance, when his consent would be implied from his duty to make requisite provision for the slave. *Dunbar v. Williams*, 10 Johns. R. 249.

<sup>2</sup> *Regina v. Smith*, 8 Car. & Payne, R. 153.

<sup>3</sup> *Priestley v. Fowler*, 3 Mees. & Welsb. R. 1.

<sup>4</sup> But see *Walker v. Bolling*, 22 Alabama R. 294.

<sup>5</sup> *Ibid.* See, also, *Brown v. Maxwell*, 6 Hill, R. 594; *Wigmore v. Jay*, 5 Exch. R. 354; *Farwell v. Boston, &c., Railroad Co.* 4 Met. R. 49; *Coon v. Syracuse & Utica Railroad*, 1 Seldon, R. 493; *Albro v. Agawam Canal Co.* 6 Cush. R. 75; *Sherman v. Rochester and Syracuse Railroad*, 15 Barbour, R. 574. But such is not the Scotch law, *Dixon v. Ranken*, 20 Law Times Rep. 44; 1 Am. Railway Cas. 569.

licious.<sup>1</sup> The presumption is, that he states what he believes to be true, and the burden is on the servant to prove that he has spoken falsely and maliciously.<sup>2</sup>

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<sup>1</sup> Rogers *v.* Clifton, 3 Bos. & Pul. R. 591; Edmondson *v.* Stephenson, Bull. N. P. R. 8; Weatherston *v.* Hawkins, 1 T. R. 110.

<sup>2</sup> Ibid.

## CHAPTER XL.

## RIGHTS, DUTIES, AND OBLIGATIONS OF THE SERVANT.

§ 962 *n.* In the first place, a servant is bound to perform the service, according to his agreement. If, therefore, he agree to serve his master for a definite period, he must serve during the whole term, or he will be entitled to no part of his wages, the contract being considered as an entire one.<sup>1</sup> Nor does it make any difference in this respect, whether the wages are a whole sum, or are to be calculated according to a certain rate per week, or month, or are payable at certain stipulated times, provided the servant agree for a definite and whole term, such an arrangement of payment being perfectly consistent with the entirety of the contract.<sup>2</sup> But if the contract be for a year, payable monthly, if the servant desires, he may at any time during the year demand payment for the entire months then elapsed, and his right to monthly payments is not waived by

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<sup>1</sup> *Olmstead v. Beale*, 19 Pick. R. 528; *Thayer v. Wadsworth*, *Ibid.* 349; *Stark v. Parker*, 2 *Ibid.* 267; *Marsh v. Rulessen*, 1 *Wend. R.* 514; *Jennings v. Camp*, 13 Johns. R. 94; *McMillan v. Vanderlip*, 12 *Ibid.* 165; *Reab v. Moor*, 19 *Ibid.* 337; *Lantry v. Parks*, 8 *Cowen, R.* 63; *St. Albans Steamboat Co. v. Wilkins*, 8 *Verm. R.* 54; *Davis v. Maxwell*, 12 *Metcalf, R.* 286; *Robinson v. Hall*, 3 *Ibid.* 301; *Wenn v. Southgate*, 17 *Verm. R.* 355; *Hunt v. The Otis Co.* 4 *Metcalf, R.* 465; *Spain v. Arnott*, 2 *Stark. R.* 256; *Lilley v. Elwin*, 11 *Q. B. R.* 755; *Swift v. Williams*, 2 *Carter, R.* 365; *Hawkins v. Gilbert*, 19 *Ala. R.* 54.

<sup>2</sup> *Ibid.* *Davis v. Maxwell*, 12 *Metcalf, R.* 286; *Ridgway v. The Hungerford Market Co.* 3 *Adolph. & Ell. R.* 171.

neglecting to demand them monthly. And if the entire wages due are not paid upon such demand, the servant may leave and sue for the same.<sup>1</sup> So, also, where there is an agreement by a workman to do a job for a fixed compensation,<sup>2</sup> the whole work must be done. But the promise to pay by the master after the failure to perform, is a waiver.<sup>3</sup>

§ 962 o. Such a contract is, however, generally subject to the implied condition of health and strength; and if the servant be actually disabled by sickness, or accident, or death, from performing the whole service, he, or his representatives, may recover a *pro rata* compensation for the service actually performed,<sup>4</sup>—unless the circumstances of the case show, that the *entire* performance constituted the express consideration of the contract.<sup>5</sup> So, also, if he be dismissed without just cause, or be so ill treated as to be justified in quitting the service, or if he depart with the consent of the master, the entire contract will be considered as rescinded, and he may recover a proportional compensation.<sup>6</sup> But if he be dismissed with just cause, the general rule holds.<sup>7</sup> So, also, an infant may avoid his contract and recover on a *quantum meruit*;<sup>8</sup> if, upon taking

<sup>1</sup> White *v.* Atkins, 8 Cush. R. 367.

<sup>2</sup> Faxon *v.* Mansfield, 2 Mass. R. 147; Ketchum *v.* Evertson, 13 Johns. R. 365; Sickels *v.* Pattison, 14 Wend. R. 257; Weeks *v.* Leighton, 5 N. Hamp. R. 343.

<sup>3</sup> See Seaver *v.* Morse, 20 Verm. R. 620; Rice *v.* Dwight Manuf. Co. 2 Cush. R. 80; Hayden *v.* Madison, 7 Greenl. R. 76. But see Monkman *v.* Sheperdson, 3 Perry & Dav. R. 182.

<sup>4</sup> Fenton *v.* Clark, 11 Verm. R. 557; Dickey *v.* Linscott, 20 Maine R. 453; Naterstrom *v.* Ship Hazard, Bee, R. 441; Fuller *v.* Brown, 11 Metcalf, R. 440; Seaver *v.* Morse, 20 Verm. R. 620. See ante, § 114.

<sup>5</sup> Cutter *v.* Powell, 6 T. R. 320.

<sup>6</sup> Lilley *v.* Elwin, 12 Jurist, 623; 11 Q. B. R. 755. See, also, 2 Smith's Leading Cases, 11. Post, § 962 t.

<sup>7</sup> Post, § 962 t; Spain *v.* Arnott, 2 Stark. R. 256; Turner *v.* Robinson, 5 Barn. & Adolph. R. 789; Ridgway *v.* The Hungerford Market Co. 3 Adolph. & Ell. R. 171; Lilley *v.* Elwin, 12 Jurist, 623.

<sup>8</sup> Moses *v.* Stevens, 2 Pick. R. 332; Vent *v.* Osgood, 19 Pick. R. 572; Whit-

all the circumstances of the case into consideration, his services appear to be worth any thing.<sup>1</sup>

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marsh v. Hall, 3 Denio, R. 375; Medbury v. Watrous, 7 Hill, R. 110; Judkins v. Walker, 17 Maine R. 38; Bishop v. Shepherd, 23 Pick. R. 492.

<sup>1</sup> Moses v. Stevens, 2 Pick. R. 332; Thomas v. Dike, 11 Verm. R. 273; Corpe v. Overton, 10 Bing. R. 252; Moulton v. Trask, 9 Metcalf, R. 577. The subject of Entire Contracts has been carefully considered in Britton v. Turner, 6 N. Hamp. R. 481, and the court came to the following conclusions:—1st. “Where a party undertakes to pay, upon a special contract for the performance of labor, he is not liable to be charged upon such special contract, until the money is earned according to the terms of the agreement; and where the parties have made an express contract, the law will not imply and raise a contract different from that which the parties have entered into, except upon some further transaction between them.

“In case of failure to perform such special contract, by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement, and the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, unless he have before assented to and accepted of what has been done, and in such case the party performing the labor is not entitled to recover, however much he may have done.

“But if, upon a contract of such a character, a party actually receives useful labor, and thereby derives a benefit and advantage, over and above the damage which has resulted from a breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of the excess. And the rule is the same, whether the labor was received and accepted by the assent of the party prior to the breach, and under a contract, by which, from its nature, the party was to receive the labor from time to time, until the completion of the whole contract, or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done.

“In case such contract is broken, by the fault of the party employed after part performance has been received, the employer is entitled, if he so elect, to put the breach of the contract in defence, for the purpose of reducing the damages, or showing that nothing is due, and the benefits for which he is liable to be charged, in that case, is the amount of value which he has received, if any, beyond the amount of the damage, and the implied promise which the law will raise, is, to pay such amount of the stipulated price for the whole labor, as remains after deducting what it would cost to procure a completion

§ 962 *p.* A servant is bound to obey all the just and reasonable commands of his master, to be careful, and faithful, as to all property committed to his charge, to do with diligence and care his proper and appointed work, and to behave with decency and in a manner consistently with his station as servant. If a just and reasonable command be disobeyed, the master may at once dismiss the servant. But the command must be just and reasonable, and within the fair scope of his employment. He is not bound to risk his safety in the service of his master, and may, if he think fit, decline any service in which he reasonably apprehends injury to himself.<sup>1</sup> But mere inconvenience to the servant does not justify him in refusing a command, and he cannot be permitted to control his master in domestic regulations. Where, therefore, a master ordered his servant to go with the horses to a marsh, which was a mile distant, immediately, and it being the servant's dinner hour, and his dinner being ready, he refused to go until after he had eaten his dinner, it was held, that the master was justified in dismissing him.<sup>2</sup> So, also, where a person was hired as a wagoner, and the practice was to work, during harvest

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of the whole service, and also any damage which has been sustained by reason of the non-fulfilment of the contract.

"If in such case it be found that the damages are equal to, or greater than the amount of the value of the labor performed, so that the employer having a right to the performance of the whole contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover.

"If the employer elects to permit himself to be charged for the value of the labor, without interposing the damages in defence, he is entitled to do so, and may have an action to recover his damages for the non-performance of the contract.

"If he elects to have the damages considered in the action against him he must be understood as conceding that they are not to be extended beyond the amount of what he has received, and he cannot therefore afterwards sustain an action for further damages." But these principles have not elsewhere been adopted.

<sup>1</sup> Per Lord Abinger, *Priestley v. Fowler*, 3 Mees. & Welsb. R. 6.

<sup>2</sup> *Spain v. Arnott*, 2 Stark. R. 256. See, also, *Read v. Dansmore*, 9 Car. & Payne, R. 588.

time, until eight o'clock in the evening, and the wagoner refused to work until that hour, because strong beer of a good quality was not allowed him, according to a pretended custom, and it appeared that there was no such custom, the master was held to be justified in dismissing him.<sup>1</sup> Again, if the master refuse to the servant leave of absence, the servant is not justified in absenting himself, except under extraordinary circumstances; as where he apprehends danger to his life or violence to his person from the master; or when there is an infection raging in the house.<sup>2</sup> But where a plaintiff asked leave of absence, on account of the sudden and dangerous sickness of her mother, and was refused, it was held, that she was not justified in leaving. It appeared, indeed, in this case, that the plaintiff did not, in the replication, allege, that she gave notice to the defendant of her mother's illness; but Baron Parke said: “*Prima facie*, the master is to regulate the time when his servant is to go out from and return to his home. Even if the replication had stated, that he had had notice of the cause of her request to absent herself, I do not think it would have been sufficient to justify her in disobedience to his order.”<sup>3</sup> And Chief Baron Pollock said: “It is very questionable whether any service to be rendered to any other person than the master would suffice as an excuse; she might go, but it would be at the peril of being told, that she could not return.” But where the disobedience is not wilful and is trivial, the servant would be excused.<sup>4</sup> Thus, a temporary absence without leave, when it was not expressly forbidden, and produced no serious inconvenience to the master,<sup>5</sup>—or neglecting to answer the bell on one or two occasions,—and occasional sulkiness and insolence of manner,—have been

<sup>1</sup> *Lilley v. Elwin*, 12 Jurist, (Eng.) 623; 11 Q. B. Rep. 755.

<sup>2</sup> *Turner v. Mason*, 14 Mees. & Welsb. R. 112.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Callo v. Brouncker*, 4 Car. & Payne, R. 518.

<sup>5</sup> *Fillicul v. Armstrong*, 7 Adolph. & Ell. R. 557; *Regina v. Stoke*, 5 Adolph. & Ell. R. (N. S.) 303.

held not to amount to such a disobedience as to justify dismissal.<sup>1</sup>

§ 962 *q.* The servant is, also, bound to be diligent and attentive to the duties of his service; and habitual neglect or absence, occasioning loss or injury to the master, will justify a dismissal, although it be not wilful and contumacious.<sup>2</sup> And if the servant agree to use his best endeavors to promote his master's interests, a neglect to do so, is good cause for dismissal.<sup>3</sup> Thus, where in an action by a servant for a month's wages, on the ground of his having been discharged without warning, it was proved, that he had been negligent in his conduct, frequently absent when his master wanted him, and often slept out of the house at night; it was held, that he could not recover, because of his misconduct.<sup>4</sup> But the neglect must be proved to be either wilful and contumacious, or injurious to the master, in order to entitle him to dismiss the servant.<sup>5</sup> And mere absence, without leave, when there is a sufficient cause to excuse it,—as an absence for the purpose of having a severe injury attended to,<sup>6</sup>—or a reasonable absence towards the end of his term for the purpose of procuring another situation (such an absence being warranted by custom),<sup>7</sup>—or a temporary absence on customary holidays,<sup>8</sup>—would not entitle the master to dismiss the servant.

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<sup>1</sup> *Callo v. Brouncker*, 4 Car. & Payne, R. 518; *Cussons v. Skinner*, 11 Mees. & Welsb. R. 161.

<sup>2</sup> *Cussons v. Skinner*, 11 Mees. & Welsb. 161.

<sup>3</sup> *Arding v. Lomax*, 28 Eng. Law & Eq. R. 543.

<sup>4</sup> *Robinson v. Hindman*, 3 Esp. R. 235. See, also, *Callo v. Brouncker*, 4 Car. & Payne, R. 518.

<sup>5</sup> *Fillieul v. Armstrong*, 7 Adolph. & Ell. R. 557; *Cussons v. Skinner*, 11 Mees. & Welsb. R. 161.

<sup>6</sup> *Rex v. Sharrington*, 4 Dough. R. 11; *Chandler v. Grieves*, 2 H. Black. R. 606 *n.*

<sup>7</sup> *Rex v. Islip*, 1 Strange, R. 423; *Rex v. Polesworth*, 2 Barn. & Ald. R. 483.

<sup>8</sup> *Rex v. Stoke*, 5 Adolph. & Ell. (N. s.) R. 303.

§ 962 r. Again, a servant is bound to behave morally and decently. And any act of dishonesty in relation to his master's property or business,<sup>1</sup> or any criminal offence, though not injurious to his master,<sup>2</sup> justifies a dismissal. The use of abusive language towards his employer, or quarrelling with the fellow-servants, has the same effect.<sup>3</sup> So, also, a servant must not abuse his position so as to injure his master, for this would entitle the master to dissolve the contract. Thus, if he should seduce other servants to leave the master's service during their term of service, he would be liable therefor. But he would not be liable for inducing them to leave upon the expiration of their term of service.<sup>4</sup> But a traveller, who solicits his master's customers to patronize him after his service shall be ended, is not considered as doing a wrong which entitles his master to dismiss him; although if he should solicit patronage of his master's customers to be given him while in the service of his master, it would be otherwise.<sup>5</sup> Again, in

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<sup>1</sup> Baillie *v.* Kell, 4 Bing. N. C. R. 638; Turner *v.* Robinson, 6 Car. & Payne, R. 15; s. c. 5 Barn. & Adolph. R. 789.

<sup>2</sup> Libhart *v.* Wood, 1 Watts & Serg. R. 265; Atkin *v.* Acton, 4 Car. & Payne, R. 208; Baillie *v.* Kell, 4 Bing. N. C. R. 638; s. c. 6 Scott, R. 379.

<sup>3</sup> See Kearner *v.* Holmes, 6 Louis. Ann. R. 373; Byrd *v.* Boyd, 4 McCord, R. 246.

<sup>4</sup> Nichol *v.* Martyn, 2 Esp. N. P. C. R. 732. See, also, Turner *v.* Robinson, 6 Car. & Payne, R. 15.

<sup>5</sup> Ibid. In this case, Lord Kenyon said, "The conduct of the defendant in this case, may perhaps be accounted not handsome; but I cannot say that it is contrary to law. The relation in which he stood to the plaintiffs, as their servant, imposed on him a duty which is called of imperfect obligation, but not such as can enable the plaintiffs to maintain an action. A servant while engaged in the service of his master, has no right to do any act which may injure his trade, or undermine his business; but every one has a right, if he can, to better his situation in the world; and if he does it by means not contrary to law, though the master may be eventually injured, it is *damnum absque injuria*. There is nothing morally bad, or very improper, in a servant, who has it in contemplation at a future period to set up for himself, to endeavor to conciliate the regard of his master's customers, and to recommend

respect to morality and decency, it has been held, that the master might dismiss a servant for assaulting a fellow maid-servant with intent to ravish her,<sup>1</sup>— or for pregnancy,<sup>2</sup>— or for getting a fellow maid-servant with child,<sup>3</sup>— or for repeated intoxication.<sup>4</sup> But the fact of a servant being the father of a bastard child before the master hired him, or being guilty of a crime of that description out of his master's house, does not justify his dismissal. It is not seducing the master's servants, or turning his house into a brothel.<sup>5</sup>

§ 962 s. Again, the doing of acts or the assertion of rights inconsistent with the relation of master and servant and injurious to the master, will justify him in dismissing the servant,<sup>6</sup>— as if the servant set up a claim to be a partner.<sup>7</sup>

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himself to them, so as to procure some business from them as well as others. In the present case, the defendant did not solicit the present orders of the customers; on the contrary he took for the plaintiffs all those he could obtain; his request of business for himself was prospective, and for a time when the relation of master and servant between him and the plaintiffs would be at an end."

<sup>1</sup> *Atkin v. Acton*, 4 Car. & Payne, R. 208.

<sup>2</sup> *Rex v. Brampton*, Cald. R. 14, 16, 17, by Lord Mansfield.

<sup>3</sup> *Rex v. Walford*, Cald. R. 57.

<sup>4</sup> *Wise v. Wilson*, 1 Car. & Kir. R. 662.

<sup>5</sup> Per Lord Mansfield in *Rex v. Westmeon*, Cald. R. 129.

<sup>6</sup> *Lacy v. Osbaliston*, 8 Car. & Payne, R. 80; *Singer v. McCormick*, 4 W. & S. R. 265.

<sup>7</sup> *Amor v. Fearon*, 9 Adolph. & Ell. R. 548. See, also, *Ridgway v. The Hungerford Market Co.* 3 Adolph. & Ell. R. 171.

## CHAPTER XLI.

## RIGHTS OF MASTER AND SERVANT ON DISSOLUTION OF THE CONTRACT.

§ 962 *t.* In the next place, as to the *dissolution of the contract*, and the rights of the master and servant consequent thereupon. If the hiring be for a definite period, and be an entire contract, and the master dismiss the servant for sufficient cause, the servant can recover no portion of his wages.<sup>1</sup> If in such a case, the servant be discharged, without sufficient cause, the master is liable in an action for damages, which will ordinarily be calculated at the entire sum of the wages; although, in some cases, it may be reduced by proof that the servant found other beneficial occupation of the same kind, or that he refused work of the same kind and in the same place, subsequently offered to him.<sup>2</sup> But it would seem, that the servant could not maintain an action for wages, unless the whole service have been performed, and he should, therefore, bring an action for damages resulting from the breach of con-

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<sup>1</sup> Turner *v.* Robinson, 5 Barn. & Adolph. R. 789; Ridgway *v.* The Hungerford Market Co. 3 Adolph. & Ell. R. 171; Lilley *v.* Elwin, 12 Jurist, 623; 11 Q. B. Rep. 755; Byrd *v.* Boyd, 4 McCord, R. 246; Wenn *v.* Southgate, 17 Verm. R. 355; Libhart *v.* Wood, 1 Watts & Serg. R. 265; ante, § 962 *n*, and cases cited.

<sup>2</sup> Ante, § 962 *o*, and cases cited; Costigan *v.* Mohawk & Hudson Railroad Co. 2 Denio, R. 612; Elderton *v.* Enmens, 4 Man. Grang. & Scott, R. 498; Stewart *v.* Walker, 14 Penn. St. R. 293.

tract.<sup>1</sup> In order to entitle him to maintain an action for damages, it is not necessary that he should wait until the term of the contract has expired, but he may bring it immediately.<sup>2</sup>

§ 962 *u.* Where the contract is entire for a definite period, and is rescinded by the mutual consent of the parties to separate and dissolve the relation of master and servant, the servant is entitled to a *pro rata* compensation for his services.<sup>3</sup> Whether the contract have been rescinded is a question for the jury.<sup>4</sup>

§ 962 *v.* If the wages be payable *pro rata* and the servant be guilty of misconduct, injurious to the master, so that he might have been dismissed, and he still be retained in service, the misconduct may operate to reduce his services; so that he could not recover for full wages in like manner as if he had served faithfully and properly.<sup>5</sup> But if, after knowledge of the servant's misconduct, the master continue him in his service, it may, under certain circumstances, amount to a condonation of the misconduct of the servant, especially, if it were not injurious to the master.<sup>6</sup>

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<sup>1</sup> *Hulle v. Heightman*, 2 East, R. 145; *Archard v. Hornor*, 3 Car. & Payne, R. 349; *Smith v. Hayward*, 7 Adolph. & Ell. R. 544; *Hartley v. Harman*, 11 Adolph. & Ell. R. 798; *Goodman v. Pocock*, 15 Q. B. Rep. 576; *Green v. Hulett*, 22 Verm. R. 188; *Fewings v. Tisdal*, 1 Ex. 295, overruling *Gandell v. Pontigny*, 4 Camp. R. 375. But see *Lilley v. Elwin*, 12 Jurist, 623; 2 *Smith's Leading Cases*.

<sup>2</sup> *Pagani v. Gandolfi*, 2 Car. & Payne, R. 371; *Dunn v. Murray*, 9 Barn. & Cres. R. 780.

<sup>3</sup> *Thomas v. Williams*, 1 Adolph. & Ell. R. 685; *Phillips v. Jones*, 1 Adolph. & Ell. R. 333; *Hill v. Green*, 4 Pick. R. 114.

<sup>4</sup> *Lamburn v. Cruden*, 2 Man. & Grang. R. 253; *Hurcum v. Stericker*, 10 Mees. & Welsb. R. 553.

<sup>5</sup> *Baillie v. Kell*, 4 Bing. N. C. R. 638; *Atkins v. Burrows*, 1 Peters, Adm. R. 247; *Mitchell v. The Ship Orozimbo*, Ibid. 250; ante, § 114.

<sup>6</sup> Per Lord Denman in *Ridgway v. The Hungersford Market Co.* 3 Adolph. & Ell. R. 174. See, also, *Buck v. Lane*, 12 Serg. & Rawle, R. 266.

§ 962 *w.* When a master dismisses his servant, if he have a good ground of dismissal, it is not necessary that he should state it to the servant,<sup>1</sup> and even if he assign an insufficient cause for the dismissal, he may nevertheless justify the act by showing, that there was a good ground of dismissal known to him at the time.<sup>2</sup> But whether, if he state an insufficient reason for the dismissal, he can afterwards, on the trial, justify himself, by showing, that the servant had been guilty of misconduct unknown to him at the time, but which, if known, would have entitled him to dismiss the servant, seems to be doubtful.<sup>3</sup> If by the contract the master has the right to dismiss upon becoming dissatisfied, he may dismiss without assigning any cause, and without the existence of any cause of dissatisfaction.<sup>4</sup>

§ 962 *x.* The next question which arises is in respect to the dissolution of the contract by *notice to leave, or warning.* Where it is provided in a contract of hiring, for a definite period, that the contract may be dissolved by a certain notice to leave, it implies an obligation on the master to employ and on the servant to serve, until such notice be given, or until the whole term be past.<sup>5</sup> Where a *domestic or menial* servant is hired *for a year*, there is a condition implied from custom, that it may be determined by either party by the payment of a month's additional wages, or by a month's warning.<sup>6</sup> And this custom applies, although the contract be in writing, unless

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<sup>1</sup> See *Mercer v. Whall*, 5 Q. B. Rep. 457.

<sup>2</sup> *Ridgway v. The Hungerford Market Co.* 3 Adolph. & Ell. R. 171; *Bailie v. Kell*, 4 Bing. N. C. R. 638.

<sup>3</sup> *Ibid.* But see *Cussons v. Skinner*, 11 Mees. & Welsb. R. 161; *Spotswood v. Barrow*, 5 Exch. R. 110; *Willetts v. Green*, 3 Car. & Kir. R. 59.

<sup>4</sup> See *Rossiter v. Cooper*, 23 Verm. R. 522; *Seaver v. Morse*, 20 Verm. R. 620.

<sup>5</sup> *Pilkington v. Scott*, 15 Mees. & Welsb. R. 657; *Hartley v. Cummings*, 5 Man. Grang. & Scott, R. 247; s. c. 2 Car. & Kir. R. 433.

<sup>6</sup> *Archerd v. Horner*, 3 Car. & Payne, R. 349; *Robinson v. Hindman*, 3 Esp. R. 235.

it be expressly or impliedly negatived by something contained therein.<sup>1</sup> A head gardener has been held a menial servant under this custom.<sup>2</sup> But this condition is only implied in cases of menial and domestic servants, and does not apply to trade servants, servants in husbandry,<sup>3</sup> clerks,<sup>4</sup> reporters,<sup>5</sup> overseers,<sup>6</sup> a governess,<sup>7</sup> and servants in similar stations. In such cases, the contract cannot be determined until the end of the year.

§ 962 *y.* Where the contract of hiring is for a year only, no notice is necessary to determine it; it ceases by the expiration of the term. But in contracts with other than domestic and menial servants, when the service is from year to year, notice must be given so as to expire with the end of the year, the contract not being determinable during the year.<sup>8</sup> But the length of notice required does not seem to be exactly settled, and in the absence of any special agreement it is governed by custom and the circumstances of the case. A reasonable time of notice is, however, required; and the notice should expire with the end of the year.<sup>9</sup>

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<sup>1</sup> *Johnson v. Blenkensop*, 5 *Jurist*, (Eng.) 870.

<sup>2</sup> *Nowlan v. Ablett*, 2 *Cromp. Mees. & Rosc. R.* 54.

<sup>3</sup> *Lilley v. Elwin*, 12 *Jurist*, (Eng.) 623; 11 *Q. B. Rep.* 754.

<sup>4</sup> *Beeston v. Collyer*, 4 *Bing. R.* 309. See post, 962 *y*, note 2, for an extract from the judgment of Mr. Ch. J. Best, in this case. See, also, *Huttman v. Boulnois*, 2 *Car. & Payne, R.* 510; *Costigan v. The Mohawk & Hudson Railroad Co.* 2 *Denio, R.* 612.

<sup>5</sup> *Williams v. Byrne*, 7 *Adolph. & Ell. R.* 177.

<sup>6</sup> *Byrd v. Boyd*, 4 *M'Cord, R.* 246. And see *Down v. Pinto*, 24 *Eng. Law & Eq. R.* 503.

<sup>7</sup> *Todd v. Kerrich*, 14 *Eng. Law & Eq. R.* 433.

<sup>8</sup> *Williams v. Byrne*, 7 *Adolph. & Ell. R.* 177.

<sup>9</sup> *Beeston v. Collyer*, 4 *Bing. R.* 309. In this case, which was an action of assumpsit brought by a clerk to an army agent for a breach of contract in discharging him, before the end of the year, for which he claimed to serve under a yearly hiring, Mr. Chief Justice Best said: "I entertain no doubt on the law or justice of this case. The defendant has not suggested any reason for ending the service of the plaintiff; and it would be, indeed, extraordinary, if

§ 962 z. In contracts of hire for the week or month, or for an indefinite period, the same rule as to notice would seem to govern as in weekly or monthly hirings of lodgings, namely, a

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a party, in his station of life, could be turned off at a month's notice, like a cook or scullion.

"If a master hire a servant, without mention of time, that is a general hiring for a year, and if the parties go on four, five, or six years, a jury would be warranted in presuming a contract for a year in the first instance, and so on for each succeeding year, as long as it should please the parties; such a contract being implied from the circumstances, and not expressed, a writing is not necessary to authenticate it. It is not necessary for us now to decide, whether six months, three months, or any notice, be requisite to put an end to such a contract, because under the circumstances of the present case, after the parties had consented to remain in the relation of employer and servant from 1811 to 1826, we must imply an engagement to serve by the year, unless reasons are given for putting an end to the contract. The defendant put an end to this engagement, without assigning any reason, and the jury, therefore, were warranted in the finding they have come to. The principles upon which the action for use and occupation proceed are the same as those which formed the ground of my direction to the jury upon the present occasion. The contract is for a year at first, and if the parties do not disagree, it goes on from one year to another. It is true that one of the incidents of a tenancy of this kind is, that it can only be determined by a half-year's notice, concluding with that day on which the tenancy commenced. We do not say that such terms are to be engrafted on contracts for the hire of servants. But the contract between the parties in this cause has been accurately described, in the first count of the declaration, as a contract for one whole year, and afterwards as long as the plaintiff and defendant should respectively please, until the expiration of the current year from the first of March; that allegation has been proved in evidence by acts from which such a contract would be implied, and being so implied, it was not necessary that it should be reduced into writing;" and Mr. Justice Gaselee said: "There can be no doubt that a general hiring is a hiring for a year. In domestic service there is a common understanding that such a contract may be dissolved on reasonable notice; as a month's warning, or a month's wages. There does not appear to be any such practice with respect to servants in husbandry, and we have no evidence what is the custom with clerks. We must, therefore, decide this case according to the general rule, and hold the contract between the parties to be a hiring for a year." See, also, Huttman v. Boulnois, 2 Car. & Payne, R. 510; Williams v. Byrne, 7 Adolph. & Ell. R. 177; Lilley v. Elwin, 12 Jurist, (Eng.) 623; Fawcett v. Cash, 5 Barn. & Adolph. R. 904; Down v. Pinto, 24 Eng. Law & Eq. R. 503.

notice equivalent to the term,— a month's notice for a monthly hiring, and a week's notice for a weekly hiring.<sup>1</sup> But the only rule, which has been laid down is, that the notice should be reasonable, the courts having studiously avoided a definite statement as to the time of notice required. What is reasonable notice must depend on custom and the circumstances of the case.

§ 962 *aa.* But where there is a specific stipulation that there shall be a certain term of notice, it should be strictly complied with. So, also, if, in the business for which the servant is hired there be a known regulation, that a certain notice shall be given, it would form a portion of the contract.<sup>2</sup> Yet if the servant quit without giving such notice, he would not thereby forfeit his whole wages, but would be liable for the damages caused by not giving notice; and in a suit for wages the amount of such damages may be deducted.<sup>3</sup> The measure of damages would ordinarily be the wages for a time equal to the agreed time of notice, unless other additional damages be proved. Yet sickness and inability to work would be a sufficient excuse for quitting without notice, and full compensation could be recovered.<sup>4</sup> Where the servant is dismissed without notice, for no sufficient cause, he is entitled to wages up to the time of the dismissal, and to damages equivalent to the wages for such time of notice as is required.<sup>5</sup> But he cannot recover such month's wages as damages, under the common *indebitatus* count for work and labor.<sup>6</sup>

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<sup>1</sup> Doe, d. Parry *v.* Hazell, 1 Esp. N. P. C. R. 94; Doe, d. Peacock *v.* Raffan, 6 Esp. N. P. C. R. 4.

<sup>2</sup> Hunt *v.* The Otis Co. 4 Metcalf, R. 465; Ballerman *v.* Pierce, 3 Hill, R. 174.

<sup>3</sup> Ibid.

<sup>4</sup> Fuller *v.* Brown, 11 Metcalf, R. 440; Fahy *v.* North, 19 Barbour, R. 341.

<sup>5</sup> Fewings *v.* Tindal, 5 Dowl. & Lowndes, R. 196.

<sup>6</sup> Hartley *v.* Harman, 11 Adolph. & Ell. R. 798. And see De Bernardy *v.* Harding, 20 Eng. Law & Eq. R. 545.



## PART III.

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DEFENCES AND DAMAGES.



# DEFENCES.

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## CHAPTER I.

### DEFENCES — PRELIMINARY.

§ 963. HAVING completed the consideration of the law applicable to contracts in general, and also the principles governing those contracts, which are of a peculiar nature, or which seemed to require a more extended and particular consideration, we now come to the subject of Defences.

§ 964. This subject we shall briefly treat, contenting ourselves with merely sketching a general outline. In fact, many of the remarks upon defences, which would come within the province of the present work, have been already anticipated in the previous pages; and, inasmuch as a thorough investigation of the law applicable to this subject belongs properly only to a treatise upon pleading, and involves principles both of law and of practice, which, beside being out of place, would, if properly examined, render the present work too bulky for convenient use, the consideration of defences will be only cursorily examined.

§ 965. In the first place, it is very evident, from what has already been stated, in the former part of this treatise, that a

violation of the legal prerequisites of a contract is a defence to any claim which may be set up under that contract. Thus, if the contract be illegal, or fraudulent, or directly contravene public policy and morality, or if the parties thereto be incompetent to contract, as if they be infants or married women, the contract cannot be enforced, and this special defence is a complete answer to the action.

§ 966. But, besides these defences, there are others, which may be pleaded in bar of an action upon a contract, which we propose to consider in the following order, namely:—1. Performance; 2. Payment; 3. Receipts; 4. Accord and Satisfaction; 5. Arbitrament and Award; 6. Pendency of another Action, or Verdict, or Judgment; 7. Release; 8. Tender; 9. Statute of Limitations; 10. Set-off.

## CHAPTER II.

## PERFORMANCE OF A CONTRACT.

§ 967. THE first of these special defences which we propose to consider is, *Performance of the Contract*; and the first question that arises is, *By whom the contract is to be performed?* The person to be discharged from liability upon a contract, by the performance of a certain act, is bound to do the act either personally or by his agent.<sup>1</sup> Thus, if a party be bound to pay a certain sum of money, a mere readiness to pay is insufficient,<sup>2</sup> it is his duty to make a tender of payment, or actually to pay the money to the party to whom it is due,<sup>3</sup> and he cannot plead a discharge by the other party from such tender or payment, without showing some new consideration therefor.<sup>4</sup> So, also, if the contract be to deliver goods at a specified place, the party who is to deliver them must be at the place appointed, in person or by his agent, and ready to deliver them.<sup>5</sup> If no place be appointed, the party whose duty it is to deliver

<sup>1</sup> Co. Litt. 211 *a*, 210 *b*, 220; Bac. Abr. Conditions; Bro. Abr. Conditions, 174; Cheney's case, 3 Leon. R. 260.

<sup>2</sup> See Haldane *v.* Johnson, 20 Eng. Law & Eq. R. 498.

<sup>3</sup> Co. Litt. § 340; Soward *v.* Palmer, 2 Moore, R. 276; Cranley *v.* Hillary, 2 M. & S. R. 122.

<sup>4</sup> Cooper *v.* Phillips, 1 Cromp. Mees. & Rosc. R. 649; Turner *v.* Hayden, 4 B. & C. R. 1; s. c. 6 Dowl. & Ry. R. 5; s. c. Ryan & M. R. 215.

<sup>5</sup> Savary *v.* Goe, 3 Wash. C. C. R. 140; Bixby *v.* Whitney, 5 Greenl. R. 192; Robinson *v.* Batchelder, 4 N. Hamp. R. 40; Savage Manuf. Co. *v.* Armstrong, 19 Maine R. 147.

them must offer to deliver them at a reasonable place; and if the offer be not accepted, he must ascertain from the promisee where he will receive them.<sup>1</sup> So, also, if special confidence be reposed in the personal skill of the person who undertakes to do any thing, he is bound to do it himself. Thus, if an artist be employed to paint a portrait, or to design a ceiling, he cannot intrust the execution of the work to a third party.<sup>2</sup>

§ 968. The next question is, as to the *mode in which a contract is to be performed*. The rule is, that an agreement must be performed according to its terms, as understood and assented to by the parties.<sup>3</sup> The assent and understanding of the parties is to be deduced from the terms of the contract, and the accompanying incidental acts, by the rules of legal construction; and whether the circumstances constitute a performance is a question for a jury to determine.<sup>4</sup> The express stipulations of a contract must, however, be exactly performed, and a substantial compliance is not sufficient, where the time or the express manner and details agreed upon are essential and not complied with.<sup>5</sup>

§ 969. When, by the terms of the contract, it is in the option of the promisor which of two acts he will perform,—as, if he agree to pay either to do a certain act at certain time, or to pay a sum of money, or deliver a horse,—the promisor has the right to elect which he will do.<sup>6</sup> For, if an election be

<sup>1</sup> White *v.* Perley, 15 Maine R. 470; Bean *v.* Simpson, 16 Maine R. 49; Howard *v.* Miner, 20 Maine R. 325; Ante, § 759.

<sup>2</sup> Pothier de Louage, No. 121.

<sup>3</sup> Dixon *v.* Fletcher, 3 Mees. & Welsb. R. 146; Ante, ch. 7; 2 Kent, Comm. Lect. 39, p. 505 to 51<sup>st</sup>, 4th ed. See Lawrence *v.* Dole, 11 Verm. R. 549.

<sup>4</sup> Savage Man. Co. *v.* Armstrong, 17 Maine R. 34.

<sup>5</sup> Hill *v.* School District No. 2, in Millburn, 17 Maine R. 316; Martin *v.* Schoenberger, 8 Watts & Serg. R. 367; Allen *v.* Cooper, 22 Maine R. 133. See, also, post, § 970 *a*.

<sup>6</sup> Layton *v.* Pearce, 1 Doug. R. 16; Penny *v.* Porter, 2 East, R. 2; Smith *v.*

given to two things, he who is the first agent, and who ought to do the first act, is entitled to the election.<sup>1</sup> But if the contract be to do one of two things by a certain day, he has the right to elect which he will do until the day is past, and not afterwards.<sup>2</sup> So, also, when one alternative is illegal, the promisor is bound to perform the other.<sup>3</sup>

§ 969 *a.* But when there are reciprocal acts to be performed by the parties at the same time, neither party is bound actually to perform his part of the agreement in order to entitle him to a right of action, but he who is able and ready to perform his contract upon offering to do so has a right of action against him who is not.<sup>4</sup> If the act of one party be a condition precedent to that of the other, as if the contract be to pay a sum on request, the plaintiff must specially allege and prove, that such act has been performed.<sup>5</sup> So, also, where the act of one party must necessarily precede any act of the other — as where one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing, and will constitute a condition precedent without express words.<sup>6</sup>

§ 970. When there is no agreement as to the *time* when a contract shall be performed, it must be executed within a rea-

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Sanborn, 11 Johns. R. 59; *Small v. Quincy*, 4 Greenl. R. 497; *Chippendale v. Thurston*, 4 C. & P. R. 98; *Appleton v. Chase*, 19 Maine R. 79.

<sup>1</sup> *Co. Litt.* 145, *a.* See ante, § 31, § 32, § 33.

<sup>2</sup> *Choice v. Moseley*, 1 Bailey, R. 136; *Shearer v. Jewett*, 14 Pick. R. 232.

<sup>3</sup> *Stevens v. Webb*, 7 C. & P. R. 61. See ante, § 31.

<sup>4</sup> *Hammond v. Gilmore*, 14 Conn. R. 479; *Brown v. Gammon*, 14 Maine R. 276.

<sup>5</sup> *West v. Murphy*, 3 Hill, S. C. R. 284; *Appleton v. Chase*, 19 Maine R. 74; *Howe v. Huntington*, 15 Maine R. 350.

<sup>6</sup> *Milldam Foundry*, 21 Pick. R. 437; *Coombe v. Greene*, 11 Mees. & Welsb. R. 480; *Knight v. New Eng. Worsted Co.* 2 Cushing, R. 286.

sonable time.<sup>1</sup> But on a contract to deliver iron to the plaintiff as required by him, the plaintiff is not bound to demand the iron within a reasonable time after the making of the contract, but only when he requires the iron.<sup>2</sup> What constitutes reasonable time, must depend upon the peculiar circumstances of each case, and is a question to be determined by the jury.<sup>3</sup> Parol evidence of the situation of the parties and of their conversations, is admissible to determine their intention in respect of the time of performance.<sup>4</sup> In contracts of sale, however, where there is no stipulation in respect of the time of payment,<sup>5</sup> or when notes are given payable in specific articles,<sup>6</sup> payment is to be made on demand.

§ 970 *a.* Time is not generally in equity deemed to be of the essence of a contract, unless the parties have so treated it, or unless an agreement to that effect is implied from the nature and circumstances of the contract.<sup>7</sup> And, although courts of equity have interposed in favor of parties who were not ready to perform their contract at the stipulated time, in cases where time was manifestly not essential, yet such an extension of the contract can only be granted in extreme cases, where a party has failed in consequence of some unforeseen accident, or where there are circumstances indicating a waiver by the other party of any objection.<sup>8</sup> They will not interfere in

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<sup>1</sup> See ante, § 759, as to the time when common carriers must make delivery of goods consigned through them. See ante, § 32.

<sup>2</sup> *Jones v. Gibbons*, 20 Eng. Law & Eq. R. 559.

<sup>3</sup> *Sawyer v. Hammatt*, 15 Maine R. 40; *Cocker v. Franklin II. & F. Man. Co.* 3 Sumner, R. 530; *Ibid.* 1 Story, R. 332; *Hill v. School District No. 2 in Milburn*, 17 Maine R. 316; *Ne'son v. Patrick*, 2 Car. & Kir. R. 641.

<sup>4</sup> *Ellis v. Thompson*, 3 Mees. & Welsb. R. 445; *Cocker v. Franklin Hemp & Flax Manuf. Co.* 3 Sumner, R. 530; *Sewall v. Wilkins*, 14 Maine R. 168.

<sup>5</sup> *Russell v. Ormsbee*, 10 Verm. R. 274; *Warren v. Wheeler*, 8 Met. R. 97.

<sup>6</sup> *Rice v. Churchill*, 2 Denio, R. 145.

<sup>7</sup> *Voorhees v. De Meyer*, 2 Barbour, S. C. R. 37; *Wiswall v. McGown*, 2 Barbour, S. C. R. 270.

<sup>8</sup> *Wiswall v. McGown*, 2 Barb. Sup. Ct. R. 270.

behalf of negligence.<sup>1</sup> Time is always considered material in cases where delay operates as an injury,<sup>2</sup> or where the parties have expressly so treated it, or where the nature and necessity of the contract require it to be so construed.<sup>3</sup> And a new agreement extending the time of the performance of a contract is evidence that the parties considered time as an essential feature.<sup>4</sup> Whenever in an agreement a specific time is fixed, the burden of proof is upon the party claiming to depart therefrom to show that it is not essential.<sup>5</sup>

§ 971. When there is any agreement as to the time when a contract is to be performed, it must be performed within, or at that time. Thus, if goods are sold, "to be delivered on or before" a certain day, they must be delivered according to the agreement, or the vendee will not be bound to accept them.<sup>6</sup> But although the vendee in such case might refuse to accept the goods delivered after the stipulated time, yet if he do accept them, he can only set up the delay in reduction of damages on suit for the agreed price. So, also, where a workman agrees to build a house and to complete it by a certain day, the employer cannot, after accepting the house, refuse to pay for it on the ground that the time was a condition precedent, and not being complied with, vacated the contract,—though he might fairly reduce the price by evidence of any injury

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<sup>1</sup> *Benedict v. Lynch*, 1 Johns. Ch. R. 370; *Lloyd v. Collett*, 4 Bro. R. 469; 13 Ves. R. 24; *Wiswall v. McGown*, 2 Barbour, S. C. R. 270. See also *Milldam Foundry v. Hovey*, 21 Pick. R. 417; *Dickey v. Linscott*, 20 Maine R. 453.

<sup>2</sup> *Bellas v. Hays*, 5 Serg. & R. R. 427.

<sup>3</sup> *Sneed v. Wiggins*, 3 Kelly, R. 94; *Liddell v. Sims*, 9 Sm. & Marsh. R. 596; *Tyler v. McCardle*, 9 Ibid. 230; *Edgerton v. Peckham*, 11 Paige, R. 352; *Hill v. School District No. 2*, in *Millburn*, 17 Maine R. 316.

<sup>4</sup> *Wiswall v. McGown*, 2 Barbour, Sup. C. R. 270.

<sup>5</sup> *Marshall v. Powell*, 9 Adolph. & Ell. (N. S.) R. 779, 791.

<sup>6</sup> *Startup v. Macdonald*, 2 Scott, N. R. 485.

resulting to him from the delay beyond the terms of the contract.<sup>1</sup>

§ 971 a. When there is any uncertainty as to whether the time allowed is to be inclusive or exclusive of particular days stated in the contract, the question must be determined by the agreement of the parties, according to the common rules of interpretation.<sup>2</sup> Where a month is agreed upon as the time

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<sup>1</sup> *Lucas v. Godwin*, 3 Bing. N. C. 744. In this case the plaintiff contracted to build certain cottages by the 10th of October, and they were not finished till the 15th. Tindal, C. J., said:—"The contract is for certain work to be done in Farcett Fen, and at the end of the contract the defendant agrees to pay £216 on the first of January, 1837, on condition of the work being completed in a proper and workmanlike manner, on the 10th of October, 1836. As the work was to be done and the payment to be made at a time which had expired before this action was commenced, I think the plaintiff was entitled to sue on the general counts. In all such cases a plaintiff is entitled to do so unless there be something express and explicit in the contract to show a condition which goes to the whole right of action. I see none such here. If it be said that the condition that the work shall be done in a proper and workmanlike manner, is of that nature, that is a condition which is implied in every contract of the same kind; and if it were a condition precedent to the plaintiff's remuneration, a little deficiency of any sort would put an end to the contract, and deprive a plaintiff of any claim for payment; but under such circumstances, it has always been held that where the contract has been executed, a jury may say what the plaintiff really deserves to have. If it be said that the completion by the 10th of October is the condition precedent, at least the objection should have been taken at the time; in accepting the work done, the defendant admits that it is of *some* benefit to him, and that the plaintiff is entitled to *some* remuneration. It is not a condition but a stipulation, for non-observance of which the defendant may be entitled to recover damages; but even if it be a condition, it does not go to the essence of the contract, and is no answer to the plaintiff's claim for the work actually done. It never could have been the understanding of the parties, that if the house were not done by the precise day, the plaintiff would have no remuneration: at all events, if so unreasonable an engagement had been entered into, the parties should have expressed their meaning with a precision which could not be mistaken."

<sup>2</sup> See ante, § 236; *Pugh v. Duke of Leeds*, Cowp. R. 714; *Watson v. Pears*, 2 Camp. R. 294.

within which, or upon the expiration of which a contract shall be performed by the common law, the presumption is, unless the circumstances of the case indicate a different conclusion, that a lunar month is intended.<sup>1</sup> But in cases of negotiable paper, and, indeed, of commercial contracts in general, a month is considered to be a calendar month.<sup>2</sup> Again, where a contract is to be performed in a certain time after it is made, or after the day of its date, or after a day specified therein, the day on which the contract is made or dated, or the day specified, is to be excluded from a computation of the time.<sup>3</sup> If a contract is to be performed in a certain time "after the date," it is of no consequence ordinarily, at what time it is executed; the time must be calculated from the date. Yet, if the circumstances manifestly indicate a different intention, it would be otherwise: as if the contract be to do work within a month from the date, and a month elapse before the contract

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<sup>1</sup> Story on Bills of Exchange, § 143, 330: 4 Kent, Comm. Lect. 56, p. 95, note (b), 4th ed.; *Joly v. Young*, 1 Esp. R. 186; *Titus v. Lady Preston*, 1 Str. R. 652; *Lang v. Gale*, 1 Maule & Selw. R. 111; *Barksdale v. Morgan*, 4 Mod. R. 185; *Jocelyn v. Hawkins*, 1 Str. R. 446. In America, the computation has, however, generally been by calendar, and not by lunar months, in common contracts and in statutes. See Kent's Comm. and Story on Bills of Exchange, cited above; *Hunt v. Holden*, 2 Mass. R. 170; *Avery v. Pixley*, 4 Mass. R. 460.

<sup>2</sup> Story on Bills of Exchange, § 143, 330; *Lang v. Gale*, 1 Maule & Selw. R. 111; *Cockell v. Gray*, 3 B. & Bing. R. 187; *Leffingwell v. White*, 1 Johns. Cas. R. 99; *Catesby's Case*, 6 Coke, R. 62; *Lacon v. Hooper*, 6 T. R. 224; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 776, 777.

<sup>3</sup> *Lester v. Garland*, 15 Ves. R. 248; *Pellew v. Inhabitants of Wonford*, 9 Barn. & Cres. R. 144; *Hardy v. Ryle*, 9 Ibid. 603; *Woodbridge v. Bridg-ham*, 12 Mass. R. 403; s. c. 13 Ibid. 556; *Henry v. Jones*, 8 Ibid. 453; *Pugh v. The Duke of Leeds*, 2 Cowp. R. 714; *Bigelow v. Willson*, 1 Pick. R. 485; *Webb v. Fairmaner*, 3 Mees. & Welsb. R. 473; *Young v. Hig-gon*, 6 Mees. & Welsb. R. 49; *Buxton v. Spires*, 2 Cromp. Mees. & Rosc. R. 601; *Blake v. Crowninshield*, 9 N. Hamp. R. 304; *Harris v. Blen*, 16 Maine R. 175; *Quarles v. George*, 23 Pick. R. 400; *Startup v. Macdonald*, in Error, 6 Man. & Gr. R. 593.

is executed.<sup>1</sup> If the contract be to be performed within a certain time "after the making," or "from henceforth," the time is to be calculated from the time when it is executed.<sup>2</sup> And the date is not conclusive proof that the contract was then executed.<sup>3</sup> If the day of performance fall on a Sunday, the contract must be performed on the Saturday preceding.<sup>4</sup>

§ 971 b. The rule as to the time and place of performance was recently thus clearly laid down by Baron Parke:<sup>5</sup> "A party who is, by contract, to pay money or to do a thing transitory to another anywhere on a certain day, has the whole of the day, and if on one of several days, the whole of the days, for the performance of his part of the contract; and until the whole day, or the whole of the last day has expired, no action will lie against him for the breach of the contract. In such a case the party bound must find the other at his peril,<sup>6</sup> and within the time limited, if the other be within the four seas;<sup>7</sup> and he must do all that, without the concurrence of the other, he can do, to make the payment, or perform the act, and that at a convenient time before midnight, such time varying according to the quantum of the payment, or the nature of the

<sup>1</sup> 4 Kent's Comm. p. 95, note (a), 5th ed.; *Russell v. Ledsam*, 14 Mees. & Welsb. R. 574; *Pugh v. Duke of Leeds*, 2 Cowp. R. 714; *Bigelow v. Willson*, 1 Pick. R. 485. Whether the word "from" is or not exclusive depends on the circumstances of the case. See *Wilkinson v. Gaston*, 9 Adolph. & Ell. (n. s.) R. 137.

<sup>2</sup> *Styles v. Wardle*, 4 Barn. & Cres. R. 908; *Wilkinson v. Gaston*, 9 Adolph. & Ell. (n. s.) R. 137.

<sup>3</sup> *Hall v. Cazenove*, 4 East, R. 477.

<sup>4</sup> *Kilgour v. Miles*, 6 Gill & Johns. R. 268; *Salter v. Burt*, 20 Wend. R. 205; *Story on Bills of Exchange*, § 338; *Ransom v. Mack*, 2 Hill, N. Y. R. 587; *Homes v. Smith*, 20 Maine R. 264; *Delamater v. Miller*, 1 Cow. R. 75. But see *Stebbins v. Leowolf*, 3 Cush. R. 137.

<sup>5</sup> *Startup v. Macdonald, in Error*, 6 Man. & Grang. R. 593.

<sup>6</sup> *Kidwelly v. Brand*, Plowd. R. 71.

<sup>7</sup> *Shepp. R. 136.*

act to be done. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made to receive and count ; or if he is to deliver goods, he must tender them so as to allow sufficient time for examination and receipt. This done, he has, so far as he could, paid or delivered within the time ; and it is by the fault of the other only that the payment or delivery is not complete. But where the thing to be done is to be performed *at a certain place*, on or before a certain day, to another party to a contract, there the tender must be to the other party *at that place* ; and as the attendance of the other is necessary at that place to complete the act, there the law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day where the thing is to be done on one day, or for the whole series of days where it is to be done on or before a day certain, and therefore it fixes a particular part of the day for his presence ; and it is enough if he be at the place at such a convenient time before sunset on the last day so that the act may be completed by daylight ; and if the party bound tender to the party there, if present, or, if absent, he be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient ; and if the tender be made *to the other party* at the place at any time of the day, the contract is performed ; and though the law gives the uttermost convenient time on the last day, yet this is solely for the convenience of both parties, that neither may give longer attendance than is necessary ; and if it happens that both parties meet at the place at any other time of the last day, or upon any other day within the time limited, and a tender is made, the tender is good.<sup>1</sup> This is the distinction which prevails in all the cases,— where a thing is to be done *anywhere*, a tender a convenient time before midnight is sufficient ; where the thing is to be done *at*

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<sup>1</sup> See Bacon's Abr. tit. Tender, D.; Co. Lit. 202, a.

*a particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time before sunset." Where, therefore, an action of assumpsit was brought for not accepting ten tons of linseed oil, delivered at nine o'clock at night, on the last of fourteen days specified as the period within which it should be delivered; it was held, that the tender was good in point of time, and consequently, that the plaintiffs having been able to meet with the defendant and actually to tender the oil to him a sufficient time before midnight to enable the latter to receive, examine, and weigh the oil, they had performed as far as they could, their part of the contract, and were entitled to recover for the breach of it by the defendant.<sup>1</sup>

§ 972. Whether a part performance will be sufficient to found an action for a proportional part of the consideration, depends upon whether the contract is an entirety or not. If it be entire, it must be wholly performed. If it be severable, a *quantum meruit* may be recovered for a partial performance.<sup>2</sup> If the performance of the whole by the one party be a condition precedent to the liability of the other party, and constitute an essential feature of the contract, a part performance will not be sufficient to found an action.<sup>3</sup> Thus where a ship was let to freight at a certain sum per month to be paid on her final discharge at the end of the voyage and she was lost

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<sup>1</sup> *Ibid.* See ante, § 579.

<sup>2</sup> *Ante*; *Thompson v. Noel*, 1 Lev. R. 15; 1 Keb. R. 100; *Needler v. Guest, Aleyn*, R. 9; *Glazebrook v. Woodrow*, 8 T. R. 366; *Duke of St. Albans v. Shore*, 1 H. Black. R. 271.

<sup>3</sup> *Gillett v. Mawman*, 1 Taunt. R. 137; *Adlard v. Booth*, 7 Car. & Payne, R. 108; *Sinclair v. Bowles*, 9 Barn. & Cres. R. 94; *Bates v. Hudson*, 6 Dowl. & Ryl. R. 3; *Countess of Plymouth v. Throgmorton*, 3 Mod. R. 153; *s. c. Salk.* R. 65; *Neal v. Viney*, 1 Camp. R. 471; *Lovatt v. Hamilton*, 5 Mees. & Welsb. R. 645; *Mechelen v. Wallace*, 7 Ad. & Ell. R. 54; *Martin v. Schoenberger*, 8

in the middle of the voyage, it was held that no action could be maintained for any freight.<sup>1</sup> So where freight was to be paid on the ship's arrival and she never arrived, the same rule was held to apply,<sup>2</sup> her arrival being a condition precedent to the recovery of any portion thereof. But if the circumstances of the case indicate a divisibility and apportionment of the contract, and the performance of the whole be not the main consideration, an action may be maintained for a part performance.<sup>3</sup> If, however, although the contract be entire, an entire performance by one party be prevented by the interference of the other party,—or be dispensed with, expressly or impliedly,—a part performance is a good ground for a *quantum meruit*.<sup>4</sup>

§ 973. If a party undertake to do certain work, or to perform certain services, his contract must be performed with proper skill and knowledge, so that some benefit may arise therefrom, or the other party will not be liable.<sup>5</sup> Thus, if a person undertake to rebuild the front of a house, and build it out of the perpendicular, and in such a manner that, from the danger of its falling, it is required to be taken down, he cannot recover any thing therefor.<sup>6</sup> So, also, if he undertake to bring about

Watts & Serg. R. 367; Bowker *v.* Hoyt, 18 Pick. R. 555; Oxendale *v.* Wetherell, 9 B. & C. R. 386; Booth *v.* Lyson, 15 Verm. R. 515.

<sup>1</sup> Byrne *v.* Pattinson, Abbott on Ship. 347; Smith *v.* Wilson, 8 East, R. 437; Mitchell *v.* Darthez, 2 Scott, R. 771.

<sup>2</sup> Gibbon *v.* Mendez, 2 Barn. & Ad. R. 17.

<sup>3</sup> Roberts *v.* Havelock, 3 Barn. & Ald. R. 404; Menetone *v.* Athawes, 3 Burr. R. 1592; Ritchie *v.* Atkinson, 10 East, R. 295.

<sup>4</sup> Brown *v.* Kimball, 12 Verm. R. 617; Blood *v.* Enos, 12 Verm. R. 625; Wilhelm *v.* Caul, 2 Watts & Serg. R. 26; Chaplain *v.* Rowley, 18 Wend. R. 187.

<sup>5</sup> Basten *v.* Butter, 7 East, R. 484; Moneypenny *v.* Hartland, 1 Car. & Payne, R. 352; s. c. 2 Ibid. 378; Denew *v.* Daverell, 3 Camp. R. 352; Bracey *v.* Carter, 12 Adolph. & Ell. R. 373; Hayselden *v.* Staff, 5 Ad. & Ell. R. 161. See ante, § 13, § 737.

<sup>6</sup> Farnsworth *v.* Garrard, 1 Camp. R. 38.

a certain result, and wholly fail in so doing, so that no benefit accrues to his employer, he cannot recover for his labor. Thus, where a workman undertook to erect a stove in a shop, and to lay a tube under the floor, which would carry off the smoke, and the plan utterly failed, so that the stove could not be used, it was held, that he was entitled to no remuneration for his labor.<sup>1</sup> But if the mode in which the work is to be done be prescribed, or if a person be ordered to make a specific article, the workman is not to be understood to warrant that the mode is a proper one, or that the article is fit for the purpose for which it is intended, and although no benefit be received from his work, he may, nevertheless, recover its value.<sup>2</sup>

§ 974. Another question to be considered is, when *notice and request to perform* are necessary. The rule is, that where the right to claim the performance of a contract depends upon the occurrence of a certain fact, the promisee is not bound to give notice thereof to the promisor, unless the contract be to be performed on condition that notice is given;<sup>3</sup> or unless the fact be peculiarly within his knowledge;<sup>4</sup> or unless it be reasonably proper under the circumstances of the case.<sup>5</sup> So, also, a request to perform need not ordinarily be averred. But if, by the express terms of the contract, a request be a condition precedent to performance, or be implied from the nature of the contract, it must be averred.<sup>6</sup> Thus, if the consideration

<sup>1</sup> Duncan .. Blundell, 3 Stark. R. 6. See, also, Duffit *v.* James, 7 East, R. 481.

<sup>2</sup> Ante, § 836; Ollivant *v.* Bayley, 5 Adolph. & Ell. (n. s.) R. 289; Chanter *v.* Hopkins, 4 Mees. & Welsb. R. 399.

<sup>3</sup> Doe, d. Palk *v.* Marchetti, 1 Barn. & Adolph. R. 715.

<sup>4</sup> 2 Saunders, 62, *a*, note 4; 1 Chitty, Pl. 6th ed. 328; Harris *v.* Ferrand, Hard. R. 42; Gibbs *v.* Southam, 5 B. & Ad. R. 913; s. c. 3 Nev. & Man. R. 155; Radford *v.* Smith, 3 Mees. & Welsb. R. 258; Bach *v.* Owen, 5 T. R. 409; Wildes *v.* Savage, 1 Story, R. 22.

<sup>5</sup> Graddon *v.* Price, 2 Car. & Payne, R. 610.

<sup>6</sup> Radford *v.* Smith, 3 Mees. & Welsb. R. 258; Bach *v.* Owen, 5 T. R. 409.

be executed, a previous request would be necessary to make it good, and, therefore, the request must be averred in the pleadings, whether it were actually made, or arose from implication from the circumstances.

§ 975. In the next place, as to *What constitutes a good excuse for non-performance*. A party is not ordinarily bound to the performance of his contract, unless it be both possible and legal in its nature. This rule does not, however, extend to contracts to do difficult, dangerous, or improbable acts.<sup>1</sup> For if, by his *own contract*, a man create a duty or charge upon himself, he is bound thereby, notwithstanding the occurrence of any contingency, because, if he had chosen, he might have provided against it by stipulations in his contract.<sup>2</sup> If, therefore, he contract to perform any thing which is possible at the time when the contract is made, but afterwards becomes an impossibility, he is liable for damages resulting from non-performance thereof.<sup>3</sup> A court of equity would, however, relieve against such a contract, where it could do so without injury to the other party.<sup>4</sup> But if an obligation be imposed on a party by *law*, and do not arise from his *contract*, if it be rendered impossible afterwards by the act of God or by the act of the government, he will be excused for *non-performance* thereof.<sup>5</sup>

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<sup>1</sup> *Paradine v. Jane*, Aleyn, R. 26, 27; *Brick Pres. Church v. The Mayor &c. of New York*, 5 Cowen, R. 538.

<sup>2</sup> *Paradine v. Jane*, Aleyn, R. 26; *Touteney v. Hubbard*, 3 B. & P. R. 300; *Bullock v. Dommitt*, 6 T. R. 650; *Hadley v. Clarke*, 8 T. R. 259; *Story on Bailments*, § 36, 37; *Medeiros v. Hill*, 8 Bing. R. 231; *Martin v. Schoenberger*, 8 Watts & Serg. R. 367; *Brown v. Kimball*, 12 Verm. R. 617, and see, also, *Spence v. Chodwick*, 10 Adolph. & Ell. R. (n. s.) 517.

<sup>3</sup> *Tuffnell v. Constable*, 3 Nev. & Per. R. 47; s. c. 7 Ad. & Ell. R. 798; *Story on Bailments*, § 36. See ante, § 463. *Fischell v. Scott*, 28 Eng. Law & Eq. R. 404.

<sup>4</sup> See ante, § 464; *Smith v. Morris*, 2 Bro. Ch. R. 311.

<sup>5</sup> *Kerrison v. Cole*, 8 East, R. 231; *Jones v. Barkley*, 2 Doug. R. 694; Lan-

§ 976. But if the promisor be prevented from performing his contract by the act of the promisee, he will be discharged from liability for *non-performance*;<sup>1</sup> unless such act of the promisee be occasioned by a previous default of the promisor.<sup>2</sup> Thus, where an agreement was made between the plaintiff and defendant, that A., the plaintiff, should pull down the walls of three houses, and erect on their site a malt house and other buildings for the defendant for a certain sum, and it appeared that the plaintiff was ready, and offered to do the work, but that the defendant prevented him, it was held that the defendant was bound to pay the money, and could not take advantage of his own wrong.<sup>3</sup> So, also, if one party be prevented by the other from completing his contract, he may recover for a part performance, although the contract be entire.<sup>4</sup> This rule does not, however, apply to cases where the essential purpose of the contract can be accomplished, and the intention of the parties can be substantially, though not literally, executed.<sup>5</sup> So, if an act cannot be completed without the concurrence of the party for whom it is to be done, and the party who is to do the act, do what he can without such concurrence, and offer to go on if such concurrence be given, he is entitled to recover.<sup>6</sup> “But a tender or offer to do a thing cannot amount to a performance in law, unless the

*Cashire v. Killingworth*, 1 *Ld. Raym. R.* 686; *Milldam Foundry v. Hovey*, 21 *Pick. R.* 417; *Wilhelm v. Caul*, 2 *Watts & Serg. R.* 26; *Chaplin v. Rowley*, 18 *Wend. R.* 187.

<sup>1</sup> *Ibid.*

<sup>2</sup> *Bryant v. Beattie*, 4 *Bing. N. C. R.* 263; *Com. Dig. Conditions*, L. 4 b; *Holme v. Gulp*, 3 *Mees. & Welsb. R.* 389; *Borden v. Borden*, 5 *Mass. R.* 67; *Thurnell v. Balbirnie*, 2 *Mees. & Welsb. R.* 786.

<sup>3</sup> *Peters v. Opie*, 1 *Vent. R.* 177. See, also, *Collins v. Price*, 5 *Bing. R.* 132; *Ferry v. Williams*, 8 *Taunt. R.* 70.

<sup>4</sup> *Wilhelm v. Caul*, 2 *Watts & Serg. R.* 26; *Chaplin v. Rowley*, 18 *Wend. R.* 187.

<sup>5</sup> *White v. Mann*, 26 *Maine (13 Shep.) R.* 361.

<sup>6</sup> *Lancashire v. Killingworth*, 1 *Ld. Raym. R.* 686; s. c. 2 *Salk. R.* 623; *Savory v. Goe*, 3 *Wash. C. C.* 140; *Fleming v. Potter*, 7 *Watts, R.* 380.

tender or offer is actually rejected, or unless it is to be made at any particular time or place, and the party to whom it is to be made does not attend; and a man who would insist on a tender or offer at a particular place, and a non-attendance by the party to whom it was to have been made, must show that he was ready at the place up to the last moment that the tender could properly have been made.”<sup>1</sup> But where, in a contract for the performance of concurrent acts, one party has utterly disabled himself from the performance of his part of the contract, it is not necessary for the other party to make an offer to fulfil his part, in order to entitle him to his action.<sup>2</sup> Thus, in a contract of sale, where the payment of the price and the delivery of the property are to be simultaneous, and the seller becomes disabled from delivering the property, it is not necessary that the purchaser should pay, or tender the price.<sup>3</sup> So, also, in a declaration for a breach of promise of marriage, if it appear that the defendant is already married to another person, the plaintiff need not plead a request and offer to perform the contract on his part.<sup>4</sup>

§ 977. In the next place, as to rescinding a contract on account of *non-performance*.<sup>5</sup> In case of violation of a contract by either party, the other party may ordinarily rescind it totally, if the contract be an entirety, or be incapable of apportionment;<sup>6</sup> or, he may rescind it partially, if the contract be capable of apportionment. Where it is partially rescinded, the party receiving the benefit, is bound to compensate the other party only *pro tanto*. But the party who is guilty of no default or violation of contract, is alone entitled to rescind it;

<sup>1</sup> White *v.* Mann, 26 Maine (13 Shep.) R. 361.

<sup>2</sup> Clark *v.* Crandall, 3 Barbour, S. C. R. 612; Lovelock *v.* Franklin, 8 Adolph. & Ell. R. (n. s.) 372.

<sup>3</sup> Ibid.

<sup>4</sup> Short *v.* Stone, 8 Adolph. & Ell. R. (n. s.) 358.

<sup>5</sup> As to the powers of the parties to a contract of sale to rescind it, see Story on Sales, ch. xiv.

<sup>6</sup> See Bailey *v.* James, 11 Grattan, R. 468.

and he must exercise that right within a reasonable time.<sup>1</sup> So, also, if after default of the other party, he do any act recognizing the contract, he cannot afterwards rescind it.<sup>2</sup> A contract cannot ordinarily be rescinded, unless both parties can be reinstated in their original situation in respect of the contract, and if one party have already recovered benefit from the contract, he cannot rescind it wholly, but is put to his action for damages, or he may set up the default of the other party to perform his part of the contract as a defence *pro tanto*.<sup>3</sup> Whether his acts in a particular case amount to a rescinding, is a question of fact for a jury. But where the party desiring to rescind a contract has been *defrauded*, and it is impossible for him to reinstate the other party in precisely the same condition, it will be sufficient if he do or offer to do all that is in his power in this respect, in order to entitle him to recover his advances.<sup>4</sup>

§ 977 a. Where the contract is not performed according to the terms of the agreement, as where work is badly done, or left unfinished, or not completed at the stipulated time, but the party for whom it is done receives the benefit thereof, he may, if sued on the contract, reduce the damages by proof of the insufficiency or incomplete performance of the work or the injury resulting to him from the delay. Nor does it matter, in such a case, whether the contract were entire and the price

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<sup>1</sup> *Towers v. Barrett*, 1 T. R. 136; *Hynde v. Whitehouse*, 7 East, R. 571; *Brinley v. Tibbetts*, 7 Greenl. R. 70; *Barnett v. Stanton*, 2 Ala. R. 181; *Minor v. Kelley*, 5 Monroe, R. 272.

<sup>2</sup> *Brinley v. Tibbetts*, 7 Greenl. R. 75; *Lindsey v. Gordon*, 13 Maine R. 60; *Barry v. Palmer*, 19 Maine R. 303.

<sup>3</sup> *Hunt v. Silk*, 5 East, R. 449; *Beed v. Blanford*, 2 Younge & Jerv. R. 278; *Shields v. Davis*, 1 Taunt. R. 65; *Franklin v. Miller*, 4 Adolph. & Ell. R. 599; *Coolidge v. Brigham*, 6 Metcalf, R. 547; *Baillie v. Kell*, 4 Bing. N. C. R. 638; *Pittsburgh Turnpike Co. v. Commonwealth*, 2 Watts, R. 433; *Conner v. Henderson*, 15 Mass. R. 319; *Havelock v. Geddes*, 10 East, R. 564; *Groundsell v. Lamb*, 1 Mees. & Welsb. R. 352.

<sup>4</sup> *Mason v. Bovet*, 1 Denio, R. 69; *Ante*, § 894 a, 844 b.

specifically agreed upon.<sup>1</sup> If the contract be entire, as we have seen, the party ordering the work may rescind; but if he do not rescind by refusing the work, but elect to accept it and receive the benefit of it, he will be responsible to the workman for the worth of the labor done and nothing more, whatever be the price originally agreed upon.<sup>2</sup> So, also, if there be a specific agreement as to time, which is not complied with, it only operates to reduce the damages in a suit for the price, unless the party not in fault refused to accept the performance after the stipulated time, and received no benefit.<sup>3</sup> But if, despite the delay, he avail himself of acts done under the contract and receive benefit therefrom, he is liable in a *quantum meruit*.

§ 977 b. Where there are mutual covenants, it is sometimes difficult to determine when they are to be considered dependent and when independent, and, therefore, when it is necessary in the declaration to aver performance and when not; and in this respect we cannot do better than to quote the conclusions of Mr. Sergeant Williams, who, after a full examination of the authorities, lays down the following rules: "1st. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed; an action may be brought for the money, or for not doing such other act before performance;

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<sup>1</sup> Havelock *v.* Geddes, 10 East, R. 564; Groundsell *v.* Lamb, 1 Mees. & Welsb. R. 352; Baillie *v.* Kell, 6 Scott, R. 379; s. c. 4 Bing. N. C. R. 638; Hill *v.* Green, 4 Pick. R. 114; Harrington *v.* Stratton, 22 Ibid. 510; Parish *v.* Stone, 14 Ibid. 198; M'Allister *v.* Reab, 4 Wend. R. 483; Chapel *v.* Hickes, 2 Cromp. & Mees. R. 214; Allen *v.* Cameron, 3 Tyrw. R. 907.

<sup>2</sup> Ibid. Oxendale *v.* Wetherell, 9 Barn. & Cres. R. 386; Reed *v.* Rann, 10 Ibid. 439; Clark *v.* Baker, 5 Metcalf, R. 452. See ante, § 25, 25 a, 25 b, 25 c, et seq.; Lucas *v.* Godwin, 3 Bing. N. C. R. 744.

<sup>3</sup> Lucas *v.* Godwin, 3 Bing. N. C. R. 737. See ante, § 971; Burn *v.* Miller, 4 Taunt. R. 745; Alexander *v.* Gardner, 1 Bing. N. C. R. 671.

for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that, which is the consideration of the money or other act.”<sup>1</sup> “But, 2d. When a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance.”<sup>2</sup> “3d. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration.”<sup>3</sup> “4th. But where the mutual covenants go to the

<sup>1</sup> *Thorpe v. Thorpe*, 1 Salk. R. 171; s. c. 1 Lord Raym. R. 665; *Peters v. Opie*, 2 Saund. R. 350; *Campbell v. Jones*, 6 T. R. 570; *Ikin v. Brook*, 1 Barn. & Adolph. R. 124; s. c. Eng. Com. Law R. vol. 20; *Irving v. King*, 4 Car. & Payne, R. 309; *Mattock v. Kinglake*, 10 Adolph. & Ell. R. 50; *Howden v. Simpson*, Ibid. 793; *Pistor v. Cater*, 9 Mees. & Welsb. R. 315; *Alexander v. Gardner*, 1 Bing. N. C. R. 671; s. c. 1 Scott, R. 630; *Robb v. Montgomery*, 20 Johns. R. 15; *Lowry v. Mehaffy*, 10 Watts, R. 387; *Goldsborough v. Orr*, 8 Wheat. R. 217; *Lord v. Belknap*, 1 Cush. R. 279; *Cunningham v. Morrell*, 10 Johns. R. 203.

<sup>2</sup> *Thorpe v. Thorpe*, 1 Salk. R. 171; s. c. 1 Lord Raym. R. 665; *Bean v. Atwater*, 4 Conn. R. 9; *Dey v. Dox*, 9 Wend. R. 129; *Morris v. Sliter*, 1 Denio, R. 59.

<sup>3</sup> The leading case is *Boone v. Eyre*, 1 H. Black. R. 273, note *a*. In this case A. conveyed to B. by deed the equity of redemption of a plantation in the West Indies, together with the stock of negroes on it in consideration of £500, and an annuity of £160 for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and B. should quietly enjoy; and B. covenanted that A. well and truly performing all and every thing therein contained on his part to be performed, he would pay the annuity. The action was brought by A. against B. on this covenant, and the breach assigned was the non-payment of the annuity,—the plea was that A. was not at the time legally possessed of the negroes on the plantation, and so had not a good title to convey. The court on demurrer held the plea to be bad. Lord Mansfield said: “The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual

whole consideration on both sides, they are mutual conditions, and performance must be averred."<sup>1</sup> "5th. Where two acts

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condition, the one precedent to the other. But where they go only to a part, where a breach may be paid for damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." Sergeant Williams, in commenting on this case, says: "The whole consideration of the covenant on the part of B., the purchaser, to pay the money, was the conveyance by A., the seller, to him of the equity of redemption of the plantation, and also the stock of negroes upon it. The excuse for non-payment of the money was, that A. had broke his covenant as to part of the consideration, namely, the stock of negroes. But as it appeared that A. had conveyed the equity of redemption to B., and so had in part executed his covenant, it would be unreasonable that B. should keep the plantation, and yet refuse payment, because A. had not a good title to the negroes. 6 Term, Rep. 573, per Ashhurst, J. Besides, the damages sustained by the parties would be unequal, if A.'s covenant were held to be a condition precedent. Duke of St. Albans *v.* Shore, H. Black. R. 279. For A. on the one side would lose the consideration money of the sale, but B.'s damage on the other might consist perhaps in the loss only of a few negroes. So where it was agreed between C. and D. that in consideration of 500*l.* C. should teach D. the art of bleaching materials for making paper, and permit him, during the continuance of a patent which C. had obtained for that purpose, to bleach such materials according to the specification; and C. in consideration of the sum of 250*l.* paid, and of the further sum of 250*l.* to be paid by D. to him, covenanted that he would with all possible expedition teach D. the method of bleaching such materials, and D. covenanted that he would, on or before the 24th of February, 1794, or sooner, in case C. should before that time have taught him the bleaching of such materials, pay to C. the further sum of 250*l.* In covenant by C. against D. the breach assigned was the non-payment of the 250*l.* Demurrer, that it was not averred that C. had taught D. the method of bleaching such materials; but it was held by the court, that the whole consideration of the agreement being, that C. should permit D. to bleach materials as well as teach him the method of doing it, the covenant by C. to teach formed but part of the consideration, for a breach of which D. might recover a recompence in damages. And C. having in part executed his agreement by transferring to D. a right to exercise the patent, he ought not to keep that right without paying the remainder of the consideration be-

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<sup>1</sup> Duke of St. Albans *v.* Shore, 1 H. Black. R. 270; Large *v.* Cheshire, 1 Vent. R. 147; Dakin *v.* Williams, 11 Wend. R. 67.

are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and in consideration

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cause he may have sustained some damage by D.'s not having instructed him; and the demurrer was overruled. *Campbell v. Jones*, 6 Term R. 570. Hence it appears that the reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be, that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration. And hence, too, it seems, it must appear upon the record that the consideration was executed in part; as in *Boone v. Eyre*, above mentioned, the action was on a deed, whereby the plaintiff had conveyed to the defendant the equity of redemption of the plantation, for the defendant did not deny the plaintiff's title to convey it; so in *Campbell v. Jones*, the plaintiff had transferred to the defendant a right to exercise the patent. Therefore, if an action be brought, on a covenant or agreement contained in articles of agreement or other executory contract, where the whole is future, it seems necessary to aver performance in the declaration of the whole, or at least of part of that which the plaintiff has covenanted to do; or at least it must be admitted by the plea that he has performed part. As where A., by articles of agreement in consideration of a sum of money to be paid to him by B. on a certain day, covenants to convey to B. on the same day a house together with the fixtures and furniture therein, and that he was lawfully seized of the house, and possessed of the fixtures and furniture. In an action against B. for the money, A. must aver that he conveyed either the whole of the premises, or at least the house to B. or it must be admitted by B. in his plea that A. did convey the house, but was not lawfully possessed of the furniture or fixtures." The question in such cases seems to depend on the implied acquiescence of the parties to treat the contract as divisible, and the covenants as separate, although originally it was entire. See ante, § 24 a, § 24 b, § 972. See, also, *Stavers v. Curling*, 3 Bing. N. C. R. 355; *Franklin v. Miller*, 4 Adolph. & Ell. R. 599; *Fishmongers Co. v. Robertson*, 5 Man. & Grang. R. 131; *Havelock v. Geddes*, 10 East, R. 555. In *Knight v. The New Eng. Worsted Co.* 2 Cushing, R. 286, Chief Justice Shaw says, in a very elaborate and able opinion: "Where several different instruments are all executed at the same time, and bear the same date, and have a relation to each other, they are all said to be deemed in law to constitute one and the same transaction,—one entire contract,—and yet the legal effect is, to bind different parties to do different things, at different times

thereof, B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing perform-

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Thus, a contract may be one and entire in its origin ; and yet, looking to the performance of different things, at different times, it may be divisible in its operation. This, then, leads to the great question, which has been much agitated in courts of law, and sometimes has been the subject of very subtle distinctions, that is to say, whether mutual stipulations are dependent, so that he who demands performance must show performance, or a tender or readiness to perform, on his part ;—or independent, so that the consideration of the stipulation on the one side, is the mutual promise on the other, not requiring an actual performance or tender, but where the remedy upon both sides is by action. This question depends upon the intention of the parties, and the nature of the respective stipulations, and is to be determined rather from the sense of the whole taken together, than upon any particular form of expression. If a party promise to build a house upon the land of another, and to dig a well on the premises, and to place a pump in it ; and the owner of the land covenants seasonably to supply all materials, and furnish a pump ; it is very clear, that the stipulation to furnish materials is dependent and constitutes a condition, because the builder cannot perform on his part, until he has the materials. So to put a pump into the well. But the stipulation to dig a well is not conditional, because it goes to a small part only of the consideration, and does not necessarily depend on a prior performance, on the part of the owner, and because a failure can be compensated in damages, and the remedy of the owner is by an action on the contract. The rule was laid down by Lord Mansfield, in the case of *Boone v. Eyre*, 2 W. Bl. R. 1312, cited in 1 H. Bl. R. 273, in a note. It is this : Where mutual covenants go to the whole consideration on both sides, there are dependent covenants, the one precedent to the other. But where they go only to a part, and a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. This rule has been restated and affirmed, with slight variations adapting it to particular circumstances, in a great number of cases, both in England and in this country. *Duke of St. Albans v. Shore*, 1 H. Bl. R. 270 ; *Campbell v. Jones*, 6 T. R. 570 ; *Havelock v. Geddes*, 10 East, R. 555, 564 ; *Glazebrook v. Woodrow*, 8 T. R. 366 ; *Storer v. Gordon*, 3 M. & S. R. 308. See, also, *Kingston v. Preston*, cited in *Jones v. Barkley*, 2 Dougl. R. 684, 689. These principles have been fully recognized and adopted in this Commonwealth. *Hopkins v. Young*, 11 Mass. R. 302 ; *Tileston v. Newell*, 13 Mass. R. 406. Where several different instruments are executed at one time, and have relation to each other, they should be construed together as one contract. *Makepeace v. Harvard College*, 10 Pick. R. 298 ; *Sibley v. Holden*, 10 Pick. R. 249. The question, whether covenants

ance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale.”<sup>1</sup> One other rule may be added, namely, that where the act of one party must necessarily precede the act of the other, it is a condition precedent, which must be performed before action can be brought against the other party.<sup>2</sup>

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are dependent or independent, depends upon the intentions of the parties, and the nature of the acts to be performed. *Howard v. Leach*, 11 Pick. R. 151. Some of the stipulations in an entire contract may be dependent, and others independent, according to their nature and the order of performance. *Couch v. Ingersoll*, 2 Pick. R. 292; *Kane v. Hood*, 13 Pick. R. 281. The same rules of construction apply to a simple contract as to a contract under seal.” See, also, *McCullough v. Cox*, 6 Barb. R. 386; *Keenan v. Brown*, 21 Verm. R. 86; *Tompkins v. Elliot*, 5 Wend. R. 496; *Chanter v. Leese*, 4 Mees. & Welsb. R. 295; s. c. 5 *Ibid.* 698; *Allen v. Cameron*, 1 Cr. & Mees. R. 832.

<sup>1</sup> *Callonel v. Briggs*, 1 Salk. R. 112; *Thorpe v. Thorpe*, 1 Salk. R. 171; *Goodisson v. Nunn*, 4 T. R. 761; note by Serg. Williams, 1 Saund. R. 320 e; *Cook v. Jennings*, 7 T. R. 381; *Peeters v. Opie*, 2 Saund. R. 352, note 3; *Campbell v. Gittings*, 19 Ohio R. 347; *Gazley v. Price*, 16 Johns. R. 267; *Williams v. Healey*, 3 Denio, R. 363.

<sup>2</sup> *Milldam Foundry v. Hovey*, 21 Pick. R. 439; *Coombe v. Green*, 11 Mees. & Welsb. R. 480; *Knight v. New England Worsted Co.* 2 Cushing, R. 286. But see *Macintosh v. The M. C. Railway Co.* 14 Mees. & Welsb. R. 548.

## CHAPTER III.

## PAYMENT.

§ 978. ANOTHER defence which may be made to a contract, is *Payment*. Payment, to be effectual, must be made to the party to whom it is rightfully due, or to his properly constituted agent. Payment made to one of two *partners* or *executors* is therefore sufficient;<sup>1</sup> because each is invested by law with the right to receive payment in behalf of all. But if the payment be made to an *attorney-at-law*, his employment by the creditor must be proved, and then the payment will be good until his authority is revoked,<sup>2</sup> and not afterwards.<sup>3</sup> Yet payment to the attorney's clerk, or agent, if he be not authorized to receive it, is not good.<sup>4</sup> It is, however, sufficient, if it be

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<sup>1</sup> Capel *v.* Thornton, 3 Car. & Payne, R. 352; Duff *v.* The East India Co. 15 Ves. R. 198; Porter *v.* Taylor, 6 M. & Selw. R. 156; King *v.* Smith, 4 Car. & Payne, R. 108; Can *v.* Read, 3 Atk. R. 695. See *ante*, Partnership,—Agency;—as to when a partner or agent may properly receive payment, so as to bind his partner or principal. Payment to one partner is good even after dissolution. King *v.* Smith, 4 Car. & Payne, R. 108.

<sup>2</sup> Hudson *v.* Johnson, 1 Wash. R. 10; Langdon *v.* Potter, 13 Mass. R. 319; Kellogg *v.* Gilbert, 10 Johns. R. 220; Jackson *v.* Bartlett, 8 Johns. R. 361; Erwin *v.* Blake, 8 Peters, R. 18.

<sup>3</sup> Parker *v.* Downing, 13 Mass. R. 465; Weist *v.* Lee, 3 Yeates, R. 47.

<sup>4</sup> Yates *v.* Freckleton, 2 Dougl. R. 623; Perry *v.* Turner, 2 Crompt. & Jerv. R. 89; Sanderson *v.* Bell, 2 Crompt. & Mees. R. 304. See Johnson *v.* Cunningham, 1 Ala. R. 249; Kellogg *v.* Norris, 5 Eng. (Ark.) R. 18.

made to a person sitting in the counting-room of the creditor, with account-books near him and apparently intrusted with the conduct of the business.<sup>1</sup> Payment to the creditor's wife will not be a valid payment, unless he has made her his agent.<sup>2</sup> In all cases, where payment is made to one's agent, its sufficiency depends upon the general principles of agency, and payment to an authorized agent, or to a person acting as ostensible agent and held out as such by the principal, will always be sufficient. Payment, however, if made to any agent must be in money, unless he be authorized to receive payment by a bill or note, or in some other way.<sup>3</sup>

§ 978 a. Where there are joint creditors, a payment by a debtor to one of them of the whole is sufficient; but a payment of all his portion to one would not enable the others to sue for their portion without joining him in the action.<sup>4</sup> So, also, payment to one of several executors is sufficient,<sup>5</sup> because they have each a power over the whole estate of the testator, and are considered as distinct persons. But this rule does not apply to bankers; and a payment by a banker to one of several joint-depositors or joint-trustees of the whole sum does not discharge him as to the others, unless the depositors were partners.<sup>6</sup> A payment to one assignee of a bankrupt ordinarily is sufficient, unless it should appear that the co-assignee expressly dissented thereto.<sup>7</sup>

<sup>1</sup> *Barrett v. Deere*, 2 Mood. & Malk. R. 200.

<sup>2</sup> *Offley v. Clay*, 2 Scott, N. R. 372; *Thrasher v. Tuttle*, 22 Maine R. 335.

<sup>3</sup> *Bartlett v. Pentland*, 10 Barn. & Cress. R. 760; *Thorold v. Smith*, 11 Mod. R. 71; *Savoury v. Chapman*, 8 Dowl. R. 656; *Kellogg v. Gilbert*, 10 Johns. R. 220; *Gullett v. Lewis*, 3 Steart, R. 35; *Carter v. Tallcott*, 10 Verm. R. 471.

<sup>4</sup> *Hatsall v. Griffith*, 4 Tyrwh. R. 488. See ante, Joint and Several Contract, § 33 et seq. 33 q; *Morrow v. Starke*, 4 J. J. Marsh. R. 367.

<sup>5</sup> *Can v. Read*, 3 Atk. R. 695. Per Lord Hardwicke.

<sup>6</sup> *Husband v. Davis*, 4 Eng. Law & Eq. R. 342; *Innes v. Stephenson*, 1 Mood. & Rob. R. 145; *Stone v. Marsh, Ry. & Mood.* R. 364.

<sup>7</sup> *Bristow v. Eastman*, 1 Esp. R. 172; *Williams v. Walsby*, 4 Esp. R. 220;

§ 978 b. Payment must, ordinarily, be made in money; but a delivery of other things, if accepted as payment by the other party, will discharge the debt in respect to which it is made.<sup>1</sup> A parol agreement by a creditor to accept part payment of a debt in money, in satisfaction for the whole debt, will not be binding upon him, for want of consideration; although he actually receive such part payment, and give a receipt for the whole debt.<sup>2</sup> But if such part payment be made in a manner more advantageous to the creditor than that agreed upon previously, as if it be made before the day upon which full payment is due,<sup>3</sup> or in a more convenient place,<sup>4</sup> or if the debtor give his *negotiable* note for part of a debt not previously negotiable,<sup>5</sup> it operates as a new consideration, and renders such an agreement binding,<sup>6</sup> although it be by parol. Such a payment must, however, be pleaded by way of accord and satisfaction. So, also, if the debtor's note of hand for a less sum than was due, with an indorsement by another person, be accepted in full satisfaction of a debt, it will operate as a complete discharge, for there a beneficial interest is acquired, and a

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Steward *v.* Lee, Mood. & Walk. R. 158; Smith *v.* Jameson, 1 Esp. R. 114. But see Can *v.* Read, 3 Atk. R. 695.

<sup>1</sup> Com. Dig. Accord, B. 1, B. 2; Bac. Abridg. Accord & Satisfaction, A.

<sup>2</sup> Fitch *v.* Sutton, 5 East, R. 232; Steinman *v.* Magnus, 11 East, R. 390; Down *v.* Hatcher, 10 Adolph. & Ell. R. 121; s. c. 2 P. & Dav. R. 292; Wright *v.* Acres, 6 Adolph. & Ell. R. 726; Seymour *v.* Minturn, 17 Johns. R. 169; Bailey *v.* Day, 26 Maine R. 88; Wheeler *v.* Wheeler, 11 Verm. R. 60; Blanchard *v.* Noyes, 3 N. H. R. 518; Warren *v.* Skinner, 20 Conn. R. 559; White *v.* Jordan, 27 Maine R. 370; Goodwin *v.* Follett, 25 Verm. R. 386. But see Miliken *v.* Brown, 1 Rawle, R. 397, 398; Kellogg *v.* Richards, 14 Wend. R. 116.

<sup>3</sup> See Brooks *v.* White, 2 Met. R. 283; Smith *v.* Brown, 3 Hawks, R. 580.

<sup>4</sup> Smith *v.* Brown, 3 Hawks, R. 580.

<sup>5</sup> Sibree *v.* Tripp, 15 M. & W. 35, where Cumber *v.* Wane, 1 Strange, R. 426, is examined.

<sup>6</sup> Fitch *v.* Sutton, 5 East, R. 232; Cooper *v.* Parker, 29 Eng. Law & Eq. R. 241; Thomas *v.* Heathorn, 2 B. & C. R. 477; s. c. 3 D. & R. R. 649. Pinneel's Case, 5 Rep. 117; Brooks *v.* White, 2 Metcalf, R. 283; Sibree *v.* Tripp, 15 Mees. & Welsb. R. 35.

valuable consideration received.<sup>1</sup> So, also, the same rule applies where the note of a third person is accepted, although it be for a sum less than the debt due.<sup>2</sup> After an action is brought, payment of the debt alone, without the costs, is not a bar to the action.<sup>3</sup> But a delivery of other things than money, although of less value than the debt, will, if received as a full payment therefor, discharge the whole debt.<sup>4</sup> And the same rule applies when services are rendered and accepted by the creditor in full payment of the debt.<sup>5</sup>

§ 979. Another special defence, which may be pleaded, is, that the debtor has discharged the contract by *giving his own negotiable security*. The giving of his bill of exchange, promissory note, or other negotiable security, by the debtor, only operates as a conditional payment, unless the parties expressly or impliedly agree to consider it as an absolute payment. The party receiving such bill or note, is bound strictly to perform all the duties of holder or indorser, as he may be; and until the security is due, his right to sue upon his original claim is suspended.<sup>6</sup> But a want of proper presentment or notice, or an unreasonable delay, by which loss is occasioned,<sup>7</sup> or an improper alteration of the bill or note,<sup>8</sup> would absolve the debtor. Upon the dishonor of the bill or note, however, if

<sup>1</sup> Boyd v. Hitchcock, 20 Johns. R. 76.

<sup>2</sup> Kellogg v. Richards, 14 Wend. R. 116.

<sup>3</sup> Randall v. Moon, 14 Eng. Law & Eq. R. 243; Goodwin v. Cremer, 16 Ibid. 90; Tarin v. Morris, 2 Dallas, R. 115; Stevens v. Briggs, 14 Verm. R. 44; Goings v. Mill, 1 Pike, R. 11.

<sup>4</sup> Andrew v. Boughey, Dyer, R. 75 a; Pinnel's Case, 5 Rep. 117; Sibree v. Tripp, 15 Mees. & Welsb. R. 35; Brooks v. White, 2 Metcalf, R. 285; Douglass v. White, 3 Barb. Ch. R. 621.

<sup>5</sup> Blin v. Chester, 5 Day, R. 359.

<sup>6</sup> Kendrick v. Lomax, 2 C. & J. R. 405; Chamberlyne v. Delarive, 3 Wils. R. 353; Bishop v. Chitty, 2 Strange, R. 1195; Gallagher v. Roberts, 2 Wash. C. C. R. 191; Raymond v. Baar, 13 Serg. & Rawle, R. 318; Smith v. Wilson, Andr. R. 187; Soward v. Palmer, 2 Moore, R. 274. See ante, § 844 a.

<sup>7</sup> Ibid.

Alderson v. Langdale, 3 Barn. & Adolph. R. 660.

he be not in default, his original rights revive and are the same as if the bill or note had never been given.<sup>1</sup> If the security be taken, however, as an absolute payment, all right of action is gone upon the original debt, although the note or bill be dishonored. Where a debtor's own security, *not negotiable*, and of no higher nature than the simple contract, is taken therefor, it will not ordinarily be considered as payment, unless there be an express agreement so to treat it; or unless it be given in renewal of a security of the same nature.<sup>2</sup> But it is for a jury to determine whether it was intended as a payment.<sup>3</sup> Where a check is given, it only operates as conditional payment, unless it be accepted as absolute payment;<sup>4</sup> and upon non-payment by the bank upon whom it is made, it is of no avail as evidence of payment.<sup>5</sup>

§ 979 a. Again, if the *promissory note or bill of a third person* be accepted by the creditor by his own voluntary act or choice, and not as a measure of necessity, there being nothing else to be attained, it will constitute a payment.<sup>6</sup> If the secu-

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<sup>1</sup> Puckford *v.* Maxwell, 6 T. R. 52; Owenson *v.* Morse, 7 Ibid. 64; Peter *v.* Beverly, 10 Peters, R. 567; Sheehy *v.* Mandeville, 6 Cranch, R. 253; Wallace *v.* Agry, 4 Mason, R. 336; Van Ostrand *v.* Reed, 1 Wend. R. 424; Bank of Troy *v.* Topping, 9 Ibid. 278; Burdick *v.* Green, 15 Johns. R. 247; Davidson *v.* Bridgeport, 8 Conn. R. 472; Elliott *v.* Sleeper, 2 N. Hamp. R. 333, 376, 525; 4 Gill & Johns. R. 305; 1 M'Cord, R. 94, 449; Reed *v.* Upton, 10 Pick. R. 525; West Boylston Manuf. Co. *v.* Searle, 15 Ibid. 230; Chapman *v.* Durant, 10 Mass. R. (Rand's ed.) 51, n. a; Chapman *v.* Searle, 3 Pick. R. 45; Zerrano *v.* Wilson, 8 Cush. R. 424.

<sup>2</sup> 2 Greenleaf on Evid. § 521; Howland *v.* Coffin, 9 Pick. R. 52; Cumming *v.* Hackley, 8 Johns. R. 202; Edmond *v.* Caldwell, 15 Maine R. 340; Tobey *v.* Barber, 5 Johns. R. 68.

<sup>3</sup> Phillips *v.* Blake, 1 Metcalf, R. 246; Snow *v.* Perry, 9 Pick. R. 539.

<sup>4</sup> Barnard *v.* Graves, 16 Pick. R. 41.

<sup>5</sup> Cromwell *v.* Levett, 1 Hall, N. Y. R. 56; The People *v.* Howell, 4 Johns. R. 296; Pearce *v.* Davis, 1 Mood. & Rob. R. 365; Puckford *v.* Maxwell, 6 T. R. 52; Everett *v.* Collins, 2 Camp. R. 515.

<sup>6</sup> Whitbeck *v.* Van Ness, 11 Johns. R. 409; Breed *v.* Cook, 15 Ibid. 241; Ellis *v.* Wild, 6 Mass. R. 322.

rity be indorsed by the creditor, the holder will have his action against him in such capacity, if, in case of non-payment, the creditor be guilty of no default. But an omission by him to require an indorsement, is *prima facie* evidence of an agreement to take them at his own risk.<sup>1</sup> Whether the security were accepted as a satisfaction of the original debt is, however, a question for a jury.<sup>2</sup> But if the bill or note of a third person be so accepted, it will constitute a sufficient payment, although it afterwards turn out to be worthless.<sup>3</sup> Where there is a sale for cash, the taking of a negotiable security will not be considered as payment if there were no original stipulation to take it;<sup>4</sup> or if the creditor were induced to take it by the fraudulent misrepresentation of the vendor as to the solvency of the parties thereto;<sup>5</sup> or if it be forced on the vendor by the necessity of the case;<sup>6</sup> or if it be forged.<sup>7</sup> Yet even although the bill given be forged, it will be a good payment, if the original agreement was to take it in satisfaction of the sale.<sup>8</sup>

<sup>1</sup> *Ibid.*

<sup>2</sup> *Hart v. Boller*, 15 Serg. & Rawle, R. 162; *Johnson v. Weed*, 9 Johns. R. 310.

<sup>3</sup> *Wyseman v. Lyman*, 7 Mass. R. 286; *Ellis v. Wild*, 6 *Ibid.* 321; *Alexander v. Owen*, 1 T. R. 225; *Harris v. Johnston*, 3 Cranch, R. 311; *Fy dell v. Clark*, 1 Esp. R. 447; *Rew v. Barber*, 3 Cowen, R. 272; *Frisbie v. Larned*, 21 Wend. R. 450; *Arnold v. Camp*, 12 Johns. R. 409; 2 *Greenleaf on Evid.* § 523; *Sard v. Rhodes*, 1 Mees. & Welsb. R. 153; *Good v. Cheesman*, 2 Barn. & Adolph. R. 328. See post, § 982 *a*.

<sup>4</sup> *Ellis v. Wild*, 6 Mass. R. 321; *Owenson v. Morse*, 7 T. R. 64; *Salem Bank v. Gloucester Bank*, 17 Mass. R. 1.

<sup>5</sup> *Pierce v. Drake*, 15 Johns. R. 475; *Willson v. Foree*, 6 *Ibid.* 110; *Brown v. Jackson*, 2 Wash. C. C. R. 24.

<sup>6</sup> *Robinson v. Read*, 9 Barn. & Cres. R. 449, by Lord Tenterden.

<sup>7</sup> *Markle v. Hatfield*, 2 Johns. R. 455; *Bank of U. S. v. Bank of Georgia*, 10 Wheat. R. 333; *Thomas v. Todd*, 6 Hill, R. 340; *Simms v. Clark*, 11 Ill. R. 137; *Ramsdale v. Horton*, 3 Barr, R. 330; *Hargrave v. Dusenbury*, 2 Hawks, R. 326.

<sup>8</sup> *Ellis v. Wild*, 6 Mass. R. 322.

§ 979 b. But the taking a negotiable note for a preexisting debt is, in some States, *prima facie* a discharge of such debt, and not a mere collateral security therefor, and the burden of proof is on the party receiving it to take it out of the rule, by showing, that it was not intended as payment;<sup>1</sup> or that it has not been paid at maturity, the holder being in no default;<sup>2</sup> or that it was forged.<sup>3</sup>

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<sup>1</sup> See *Butts v. Dean*, 2 Met. R. 76; *Curtis v. Hubbard*, 9 Met. R. 328; *Bangor v. Warren*, 34 Maine R. 324.

<sup>2</sup> *Melledge v. Boston Iron Co.*, 5 Cush. R. 158. In this case, Mr. Chief Justice Shaw said:—"Upon the other point the jury were instructed that the taking a negotiable promissory note for a preexisting debt, was *prima facie* a discharge of the original indebtedness; that the burden of proof was on the plaintiff to show some sufficient and legal reason for taking the case out of the general rule; that he must control the effect which the law otherwise gives to the acceptance of negotiable notes, and in the present case, as the notes purported to be the notes of third persons, the plaintiff had the further burden to show some sufficient reason why they did not discharge all liability on the part of the defendants to the amount of these notes. The Court are of opinion that the directions were sufficiently favorable to the defendants, and had the verdict been the other way, the plaintiffs would have had more cause to complain of them. It is true that it has long been held as the law of Massachusetts, that when the party bound to the payment of a simple contracted debt, shall give his or their own promissory negotiable note for it, the law presumes it to have been accepted in satisfaction and discharge of the preexisting debt, because the party receiving the note relinquishes no security, but has the same responsibility for payment which he had before, with more direct and unequivocal evidence of the debt, and a more simple remedy for recovering it, with power also by indorsement to transfer the whole interest in it to another. There seems, therefore, to be no motive for retaining and keeping alive the original debt. But the presumption that any negotiable note is taken in satisfaction of a preexisting debt, and not as collateral security, is a presumption of fact only, and may be rebutted and controlled by evidence that such was not the intention of the parties. So that when the promissory note given is not the obligation of all of the parties who are liable for the simple contract debt and *a fortiori*, when the note is that of a third person, and if held to be in satisfaction, would wholly discharge the liability of the party previously liable, the presumption, if it exists at all, is of much less

<sup>3</sup> *Ellis v. Wild*, 6 Mass. R. 321.

§ 979 c. If bank-notes be taken as payment, and at the time the bank have stopped payment, and the fact be unknown to

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weight, and it is a question of fact, on the evidence, whether the promissory note given on the one hand and accepted on the other, was in satisfaction and discharge of the original debt; thus in the early case of *Maneely v. McGee et al.* 6 Mass. R. 143, where the promissory note of one who acted as agent and manager for the others was taken, for a debt due from four, it was held upon rather slight evidence, that it was not intended, and therefore would not operate, as payment. So in *French v. Price*, 24 Pick. R. 13, it was decided that when several persons were liable for goods purchased by an agent, and the vendors knowing that others were liable, but without insisting on such liability, took the note of the agents alone, this was presumptive evidence of payment. But, said the court, it is competent to the plaintiff to rebut this presumption, and they add, if there was any deception or fraud in the giving of the notes, or if they were accepted under an ignorance of the facts, or a misapprehension of the rights of the parties, the vendors ought not to be bound by the acceptance, they may repudiate the notes and rely upon the original contract of sale. The principle rests on the ground that if the vendors know that others are liable, whether they know who those others are or not, they voluntarily assume the responsibility of those others, taking the notes of part of those liable. So when goods are purchased for a company and a note given therefor by one professing to act as agent of the company, and supposed to be duly authorized to give the note of the company, when it appeared that the agent was not duly authorized, and the note was unavailing as the note of the company, although the holder might have treated it as the personal note of the agent, yet it was held, that the holder was not bound to do so, but might treat the note as void, and recover against the company on the original contract for goods sold. *Emerson v. Providence Hat Manufacturing Company*, 12 Mass. R. 237.

And a receipt of payment given on the bill for goods sold, a receipt being by law explainable by evidence *aliunde* does not bar the vendor from recovering for goods sold, where the acceptance of the note is not intended to serve by way of payment and satisfaction. *Vancleef v. Therasson*, 3 Pick. R. 12. So, if goods are sold to be paid for by a note made by one person and indorsed by another, and a note of corresponding description is offered and received, and the goods are thereupon delivered, and it appears afterwards that the indorsement was a forgery, it was held that such delivery of the note was no payment, and an action would lie for the goods. *Ellis v. Wild*, 6 Mass. R. 321. With this view of the law as to the presumption of fact, arising from the acceptance of a negotiable promissory note for a pre-existing debt, whether it be the note of the same parties originally liable, or part of the same parties, or the note, genuine or otherwise, of a third person,

both parties, in the absence of fraud, the party paying must bear the loss.<sup>1</sup> The same rule applies when the notes prove to be counterfeit.<sup>2</sup> It has, indeed, been held that where bank-bills are taken in payment, and the bank is insolvent, the person taking them must bear the loss, unless there were circumstances of fraud, as when the payer knows the bills not to be good.<sup>3</sup> But the better doctrine seems to be that they would not operate as a discharge of the debt, unless the circumstances of the case showed that they were not accepted conditionally on their being good (which is the general implication growing out of the mere giving and receiving of bank-notes); but were taken as absolute payment at the risk of the payee.<sup>4</sup>

§ 979 d. Where payment is made *bonâ fide* to a bank in its own notes, and they turn out to be forged, the bank must bear the loss; and this rule obtains on the ground that the bank have superior means of knowing whether the notes are genuine, and that they are guilty of negligence in accepting

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we repeat the opinion, that we think the general ruling under which the evidence went to the jury was correct, and was sufficiently favorable for the defendants." In New York, the taking of a note is not *primâ facie* payment, but may be, if so agreed. Benedict *v.* Green, 15 Johns. R. 247; Hughes *v.* Wheeler, 8 Cowen, R. 77.

<sup>1</sup> Lightbody *v.* Ontario Bank, 11 Wend. R. 9; Ontario Bank *v.* Lightbody, 13 Wend. R. 101; Gilman *v.* Peck, 11 Vermont R. 516; Wainright *v.* Webster, 11 Vermont R. 576; Frontier Bank *v.* Morse, 22 Maine R. 88; Timmis *v.* Gibbins, 14 Eng. Law & Eq. R. 64, and Bennett's note; U. S. Bank *v.* Georgia, 10 Wheat. R. 333. See Story on Bills of Exchange, § 225 and note; Ibid. § 419; Fogg *v.* Sawyer, 9 New Hamp. R. 365.

<sup>2</sup> Ibid. Ellis *v.* Wild, 6 Mass. R. 321.

<sup>3</sup> Bayard *v.* Shunk, 1 Watts & Serg. R. 92; Scruggs *v.* Gass, 8 Yerg. R. 175; Lowrey *v.* Murrell, 2 Porter, R. 280; Young *v.* Adams, 6 Mass. R. 182.

<sup>4</sup> Lightbody *v.* Ontario Bank, 11 Wend. R. 9; Harley *v.* Thornton, 2 Hill, (S. C.) R. 509. See *supra*. See, also, U. S. Bank *v.* Georgia, 10 Wheat. R. 333; Thomas *v.* Todd, 6 Hill, S. C. R. 340; Mudd *v.* Reeves, 2 Harr. & Johns. 368; Ramsdale *v.* Horton, 3 Barr, R. 330; Eagle Bank *v.* Smith, 5 Conn. R. 71.

them without proper examination.<sup>1</sup> So, also, if a bank pay a forged check on itself, it must bear the loss.<sup>2</sup> But payment to a banker or other person, by accepted bills or bank-notes not his own, which proved to be forged, is not a sufficient payment,<sup>3</sup> unless he be guilty of negligence in the discovery of the forgery, by which the payer is deprived of his remedy against the other party.<sup>4</sup>

§ 980. When payments of debts are made, a question often arises, as to the manner in which they are to be appropriated, when there are different debts due to the person to whom payment is made. Where a person owes money upon several distinct accounts, he may direct his payments to be applied to either. If he make a payment, without giving any direction as to its appropriation, the creditor may (as we have already seen<sup>5</sup>) apply it; but the authorities are not agreed whether the creditor can in such case appropriate the payment to items of an account, not then recoverable by law.<sup>6</sup> If neither party make a specific appropriation, the law will appropriate it according to the justice and equity of the case.<sup>7</sup> Where there is

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<sup>1</sup> See *U. S. Bank v. Georgia*, 10 Wheat. R. 333, in which this whole question is very elaborately considered. *Gloucester Bank v. The Salem Bank*, 17 Mass. R. 33.

<sup>2</sup> *Levy v. The Bank of U. S.* 1 Binn. R. 27; *Bank of St. Albans v. F. and M. Bank*, 10 Verm. R. 141.

<sup>3</sup> See cases cited *supra*; *Markle v. Hatfield*, 2 Johns. R. 455; *Young v. Adams*, 6 Mass. R. 182; *Stedman v. Gooch*, 1 Esp. N. P. C. R. 5; *Eagle Bank v. Smith*, 5 Conn. R. 71; *Jones v. Ryde*, 5 Taunt. R. 488.

<sup>4</sup> *Smith v. Mercer*, 6 Taunt. R. 76; *Gloucester Bank v. Salem Bank*, 17 Mass. R. 33.

<sup>5</sup> See ante, § 878.

<sup>6</sup> See *Treadwell v. Moore*, 34 Maine R. 112; *Caldwell v. Wentworth*, 14 N. H. R. 431; *Ayer v. Hawkins*, 19 Verm. R. 26.

<sup>7</sup> Per Mr. Justice Story, in *Cremer v. Higginson*, 1 Mason, R. 323; *U. S. v. Wardwell*, 5 Mason, R. 85; *Pattison v. Hull*, 9 Cow. R. 747; *Niagara Bank v. Roosevelt*, 9 Cow. R. 409; *Reed v. Boardman*, 20 Pick. R. 416; 1 Story,

one entire account, with many items, payments made without appropriation are generally to be applied to extinguish the debts according to priority of time.<sup>1</sup> No express appropriation is, however, necessary; but the acts of the parties, and the circumstances of the payment, may afford sufficient evidence of the intention to create an appropriation.<sup>2</sup>

§ 980 a. Where a *remittance* of payment is made by post, the debtor must show that it was properly sealed, and directed, and delivered at the post-office. And it must also appear, that he was either directly authorized by the creditor to take this course, or that such had been the previous course of dealing between the parties, from which an authorization may be pre-

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Eq. Jurisp. § 459 a, to § 459 g. Ante, § 878, for a full statement of the rules of law as to appropriations of payment.

<sup>1</sup> U. S. *v.* Kirkpatrick, 9 Wheat. R. 720; *Gass v. Stinson*, 3 Sumner, R. 101; *Pattison v. Hull*, 9 Cow. R. 747, 765; *Clayton's Case*, 1 Meriv. R. 572; *Bodenham v. Purchas*, 2 B. & Ald. R. 47; *Field v. Carr*, 2 M. & P. R. 46; s. c. 5 Bing. R. 13.

<sup>2</sup> *Taylor v. Sandiford*, 7 Wheat. R. 20; *Stone v. Seymour*, 15 Wend. R. 31; *Bodenham v. Purchas*, 2 B. & Ald. R. 39. In *Dulles v. De Forest*, 19 Conn. R. 190, it appeared that C. to D., and E., having received the goods of A. for sale on commission, and having advanced to A. the sum of 2,000 dollars, to aid him in a branch of manufacture distinct from his general business, by accepting his drafts on time, and afterwards paying them, blended, in one general account upon their books, the amount so advanced to A. with the avails of the goods of A. sold by them; such acceptances being charged when they were given, and not when paid; and such account was from time to time rendered by them, to A. Neither party having made any specific application of the moneys arising from the sale of A.'s goods to the payment of the sum so advanced; it was held, 1. That the presumption of law from the mode of keeping the account was, that the payments were to be applied to the oldest items on the opposite side; but 2. That this rule, being founded on the presumed intention of the parties, is applicable only, where there is no evidence sufficient to show a different intention; and where there is, that intention, when ascertained, must govern the application; 3. That in this case the intention of the parties might be gathered, not only from the mode of keeping the account, but from the course of dealing between the parties, the object for which the note was given, and suffered to remain in the hands of the holders, and from all the circumstances of the case.

sumed.<sup>1</sup> He is bound, also, to use all care and diligence appropriate to the occasion, and in case there be no directions by the debtor, he should (as it would seem) take the precaution of cutting bank-notes or similar securities.<sup>2</sup>

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<sup>1</sup> *Warwick v. Noakes*, 1 Peake, R. 67; *Hawkins v. Rutt*, 1 Peake, R. 186; 2 Greenleaf on Evid. § 525; *Walter v. Haynes*, Ryan & Mood. R. 149. See *Gordon v. Strange*, 1 Exch. R. 477.

<sup>2</sup> Peake on Evid. by Norris, p. 412; 2 Greenleaf on Evid. 525, (note).

## CHAPTER IV.

## RECEIPTS.

§ 981. In the next place, as to the effects of *Receipts*. A receipt for money paid, constitutes only presumptive proof of payment, and may be explained by parol evidence;<sup>1</sup> or it may be rebutted by proof of mistake, falsity, or fraud.<sup>2</sup> This seems to constitute an admitted exception to the general rule of evidence, that a written paper is not to be contradicted or varied by parol evidence.<sup>3</sup> Where one of several creditors discharges the debt by a collusive receipt without payment of money or its equivalent, a court of law will not allow the debtor to avail himself thereof; but in such case the fraud must clearly appear.<sup>4</sup>

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<sup>1</sup> *Graves v. Key*, 3 B. & Ad. R. 313; *Stackpole v. Arnold*, 11 Mass. R. 27, 32; *Harden v. Gordon*, 2 Mason, R. 561; *Putnam v. Lewis*, 8 Johns. R. 389; *Monell v. Lawrence*, 12 Johns. R. 521; *Melledge v. Boston Iron Co.* 5 Cush. R. 158; (see ante, § 979 *a*, note); *Vancleef v. Therasson*, 3 Pick. R. 12. See post, § 982.

<sup>2</sup> *Straton v. Rastall*, 2 T. R. 366; *Lampon v. Corke*, 5 B. & Ald. R. 611; *Skaife v. Jackson*, 3 B. & C. R. 421; *Farrar v. Hutchinson*, 1 P. & Dav. R. 437.

<sup>3</sup> *Greenleaf on Evidence*, § 305; *Dutton v. Tilden*, 13 Penn. St. R. 46; *Kirkpatrick v. Smith*, 10 Humph. R. 188.

<sup>4</sup> *Phillips v. Clagett*, 11 Mees. & Welsb. R. 93; *Wild v. Williams*, 6 Mees. & Welsb. R. 490; *Barker v. Richardson*, 1 Younge & Jerv. R. 362; *Legh v. Legh*, 1 Bos. & Pul. R. 447; *Innell v. Newman*, 4 Barn. & Ald. R. 419; *Manning v. Cox*, 7 Moore, R. 617. See § 982.

## CHAPTER V.

## ACCORD AND SATISFACTION.

§ 982. ANOTHER defence is, *Accord and Satisfaction*. An accord is an agreement between two parties to substitute some equivalent in satisfaction of a claim due from one to the other.<sup>1</sup> It must be advantageous to the party accepting it;<sup>2</sup> it must be in full satisfaction of the thing demanded;<sup>3</sup> it must be certain; and it must be perfectly executed.<sup>4</sup> If, therefore, the accord be originally of nothing beneficial, or if, although originally beneficial, it be afterwards rendered worthless by the act or omission of the party giving it, it would be insufficient.<sup>5</sup> So, also, the acceptance of a part of a liquidated and undisputed debt, would not suffice even though a receipt be given in full of the whole sum,<sup>6</sup> unless some peculiar benefit be received, operat-

<sup>1</sup> Bacon, Abr. Accord.

<sup>2</sup> Keeler v. Neal, 2 Watts, R. 424; Davis v. Noaks, 3 J. J. Marsh. R. 497; Turner v. Browne, 3 C. B. R. 157; Hall v. Smallwood, Peake's Add. Cas. 13; Logan v. Austin, 1 Stew. R. 476.

<sup>3</sup> Warren v. Skinner, 20 Conn. R. 559; Worthington v. Wigley, 3 Bing. N. C. R. 454; Mitchell v. Cragg, 10 Mees. & Welsb. R. 367; Greenwood v. Lidbetter, 12 Price, R. 183; Smith v. Bartholomew, 1 Metcalf, R. 276; White v. Jordan, 27 Maine R. 270; Bruce v. Bruce, 4 Dana, R. 530.

<sup>4</sup> Com. Dig. Accord, B. 1, 3, 4; Bacon, Abr. Accord, a; Cuxon v. Chadley, 3 Barn. & Cres. R. 591; s. c. 5 D. & R. R. 417.

<sup>5</sup> Turner v. Browne, 3 C. B. R. 157; Hall v. Smallwood, Peake's Add. Cas. 13; Preston v. Christmas, 2 Wilson, R. 86.

<sup>6</sup> Warren v. Skinner, 20 Conn. R. 559, and cases cited above, note 3.

ing as an additional consideration;<sup>1</sup> as if part be paid before the whole is due,<sup>2</sup> or if payment be made at a more convenient place,<sup>3</sup> or if a third person give his note for the sum due.<sup>4</sup> But if the claim be not liquidated, but open to dispute, a receipt in full could be pleaded as an accord with satisfaction, on the ground that a fair compromise and settlement of a claim should be upheld.<sup>5</sup> But if goods or chattels or services be received in full payment of a debt, it is a sufficient accord and satisfaction, although the goods or services are not of the value of the debt.<sup>6</sup> An accord, or agreement, to do a certain act, which is accordingly done, is an accord with satisfaction, and is a good defence in an action of assumpsit.<sup>7</sup> But if the accord be to pay money, in satisfaction, it will not operate as a defence, until payment is actually made; and proof of readiness to pay, or even of a tender and refusal, is not sufficient. For a mere agreement to do a future act is only an accord, without satisfaction, which is no defence.<sup>8</sup> An accord executed before a breach of the contract

<sup>1</sup> Douglass *v.* White, 3 Barb. Ch. R. 621; Hinckley *v.* Arey, 27 Maine R. 362; Milliken *v.* Brown, 1 Rawle, R. 391; Sibree *v.* Tripp, 15 Mees. & Welsb. R. 23; Watkinson *v.* Inglesby, 5 Johns. R. 386.

<sup>2</sup> Pinnel's case, 5 Rep. 117; Brooks *v.* White, 2 Metcalf, R. 283; Smith *v.* Brown, 3 Hawkes, R. 580; Goodnow *v.* Smith, 18 Pick. R. 414.

<sup>3</sup> Smith *v.* Brown, 3 Hawkes, R. 580. See ante, § 978 b.

<sup>4</sup> Brooks *v.* White, 2 Metcalf, R. 283; Boyd *v.* Hitchcock, 20 Johns. R. 76; Steinman *v.* Magnus, 11 East, R. 390; Lewis *v.* Jones, 4 Barn. & Cres. R. 506; Kellogg *v.* Richards, 14 Wend. R. 116.

<sup>5</sup> Longridge *v.* Dorville, 5 Barn. & Ald. R. 117; Wilkinson *v.* Byers, 1 Adolph. & Ell. R. 106; Reynolds *v.* Pinhowe, Cro. Eliz. R. 429; Palmerton *v.* Huxford, 4 Denio, R. 166; Tuttle *v.* Tuttle, 12 Metcalf, R. 551; Atlee *v.* Backhouse, 3 Mees. & Welsb. R. 651; Stockton *v.* Frey, 4 Gill, R. 406.

<sup>6</sup> Blinn *v.* Chester, 5 Day, R. 359; Reed *v.* Bartlett, 19 Pick. R. 273.

<sup>7</sup> Com. Dig. Accord, B. 4; Allen *v.* Harris, Lord Raym. R. 122; Lynn *v.* Bruce, 2 H. Bl. R. 317; Drake *v.* Mitchell, 3 East, R. 251; Collingbourne *v.* Mantell, 5 Mees. & Welsb. R. 289; s. c. 7 Dowl. R. 518; Bayley *v.* Homan, 5 Scott, R. 94, 103; s. c. 3 Scott, R. 384; Edwards *v.* Chapman, 1 Mees. & Welsb. R. 231; Watkinson *v.* Inglesby, 5 Johns. R. 386; Coit *v.* Houston, 3 Johns. Cas. R. 243; 16 Johns. R. 86.

<sup>8</sup> Com. Dig. Accord, B. 4; Cock *v.* Honeychurch, 2 Keble, R. 690; Pey-

to which it pleaded as a defence, is not valid.<sup>1</sup> Where, however, there are mutual promises to perform, the accord is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance.<sup>2</sup> But the remedy ought to be such, that the party might have taken it, upon the mutual promise, at the time of the agreement.<sup>3</sup>

§ 982 a. In some cases, however, the accord might operate as an absolute extinguishment of the original contract by way of substitution or novation, or as a conditional extinguishment of the debt so far as the action thereon is concerned. Thus, if a settlement be made of the old contract by a new arrangement varying it in form, and agreed to be substituted therefor, upon a sufficient consideration, the plea of this accord would be a sufficient answer to an action on the original contract.<sup>4</sup> But in such cases it must clearly appear, that the substituted agreement was intended to operate as an extinguishment of the debt,<sup>5</sup> and the plea should so aver. Again, where a new promise, conditional in its terms, is substituted for the original obligation and accepted as full satisfaction, on condition of its

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toe's case, 9 Rep. 79 a; Brooklyn Bank *v.* De Grauw, 23 Wend. R. 342; Watkinson *v.* Inglesby, 5 Johns. R. 386; Frost *v.* Johnson, 8 Ohio R. 393.

<sup>1</sup> Healey *v.* Spence, 20 Eng. Law & Eq. R. 476; Snow *v.* Franklin, Lutw. R. 358; Mayor of Berwick *v.* Oswald, 16 Eng. Law & Eq. R. 236.

<sup>2</sup> Com. Dig. Accord, B. 1-4.

<sup>3</sup> Com. Dig. Accord, B. 4.

<sup>4</sup> See ante, ch. XVI., *Change of Parties by Novation or Substitution*, and cases cited. See, also, Babcock *v.* Hawkins, 23 Verm. R. 561; Lewis *v.* Lyster, 2 Cromp. Mees. & Rose. R. 704; Kearslake *v.* Morgan, 5 T. R. 514; Sand *v.* Rhodes, 1 Mees. & Welsb. R. 153; Good *v.* Cheesman, 2 Barn. & Adolph. R. 328; Griffiths *v.* Owen, 13 Mees. & Welsb. R. 63; Evans *v.* Powis, 1 Excheq. R. 601; Holcomb *v.* Stimpson, 8 Verm. R. 141.

<sup>5</sup> Reeves *v.* Hearne, 1 Mees. & Welsb. R. 323; Bayley *v.* Homan, 3 Bing. N. C. R. 920; Griffiths *v.* Owen, 13 Mees. & Welsb. R. 63; Carter *v.* Wormald, 1 Excheq. R. 81; Collingbourne *v.* Mantell, 5 Mees. & Welsb. R. 289; Allies *v.* Probyn, 5 Tyrw. R. 1079; Harris *v.* Reynolds, 7 Q. B. R. 71; Gifford *v.* Whittaker, 6 Ibid. 249; James *v.* David, 5 T. R. 140.

performance at a fixed day, it would be a good answer to an action on the original claim, until the conditional and substituted contract was broken by non-performance at the time fixed. Thus, if a promissory note or bill of exchange should be given and accepted as a settlement of a debt, it would operate as a temporary suspension of the right to sue on the original contract. But upon failure to pay the note or bill when due, the right to sue on the original contract would revive.<sup>1</sup> In such cases, however, the question depends on the intention of the parties as manifested by the exact circumstances of each case.<sup>2</sup> If it appear, that a promissory note is

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<sup>1</sup> Peter *v.* Beverly, 10 Peters, R. 567; Wallace *v.* Agry, 4 Mason, R. 336; Sheehy *v.* Mandeville, 6 Cranch, R. 253; Burdick *v.* Green, 15 Johns. R. 247; Hughes *v.* Wheeler, 8 Cowen, R. 77; Van Ostrand *v.* Reed, 1 Wend. R. 424; Bill *v.* Porter, 9 Conn. R. 23; Elliott *v.* Sleeper, 2 N. Hamp. R. 525. See ante, § 979, 979 *a*, 979 *b*.

<sup>2</sup> Babcock *v.* Hawkins, 23 Verm. R. 561. In this case there was an action on a book account, and it appeared that after the commencement of the suit, there was an agreement between the parties by which the defendant was to give a note for \$30 to the plaintiff and pay the costs of the suit, except the writ and service. The note was accordingly executed and a receipt given in these words: "Received of Peter Hawkins thirty dollars by note given per this date, in full to settle all book accounts up to this date." The defendant paid part of the note but none of the costs as agreed, and for this reason the plaintiff refused to discontinue the suit. These facts being found by an auditor, judgment was rendered for the defendant which was affirmed by the supreme court. Redfield, J., said: "We think it must be regarded as fully settled, that an agreement upon sufficient consideration, fully executed, so as to have operated, in the minds of the parties, as a full satisfaction and settlement of a preexisting contract or account, between the parties, is to be regarded as a valid settlement, whether the new contract be ever paid or not, and that the party is bound to sue upon the new contract, if such were the agreement of the parties. This is certainly the common understanding of the matter. It is reasonable, and we think it is in accordance with the strictest principles of technical law.

" 1. There is no want of consideration, in any such case, where one contract is substituted for another, and especially so, where the amount due upon the former contract or account is matter of dispute. The liquidating a dis-

accepted as an unconditional and full settlement of a debt,<sup>1</sup> or even as a final statement of a debt of which the items were in dispute,<sup>2</sup> the action must be brought on the promissory note, and not on the original account. So, also, if the new promise

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puted claim is always a sufficient consideration for a new promise. *Holcomb v. Stimpson*, 8 Verm. R. 141.

“2. The accord is sufficiently executed, when all is done, which the party agrees to except in satisfaction of the preexisting obligation. This is, ordinarily, a matter of intention, and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose. This may be done by surrender of the former securities, by release or receipt in full, or in any other mode. All that is requisite is, that the debtor should have executed the new contract to that point whence it was to operate as satisfaction of the preexisting liability, in the present tense. That is shown, in the present case, by executing a receipt in full, the same as if the old contract had been upon note, or bill, and the papers had been surrendered.

“3. In every case where one security, or contract, is agreed to be received in lieu of another, whether the substituted contract be of the same or a higher grade, the action, in case of failure to perform, must be upon the substituted contract. And in the present case, as it is obvious to us, that the plaintiffs agreed to accept the note and the defendant's promise to pay the costs in full satisfaction, and in the place of the former liability, the defendant remained liable only upon the new contract.

“4. In all cases where the party intends to retain his former remedy, he will neither surrender or release it; and whether the party shall be permitted to sue upon his original contract is matter of intention always, unless the new contract be of a higher grade of contract, in which case it will always merge the former contract, notwithstanding the agreement of the debtor to still remain liable upon the original contract.

“5. In every case of a valid contract, upon sufficient consideration to discharge a former contract in some new mode, the new contract supersedes the remedy for the time, until there has been a failure; and then the creditor may always, if he choose, sue upon the new contract. This is certainly the inclination of the more modern cases.” See, also, *Good v. Cheesman*, 2 Barn. & Adolph. R. 328; *Evans v. Powis*, 1 Excheq. R. 601; *Sand v. Rhodes*, 1 Mees. & Welsb. R. 153.

<sup>1</sup> *Sand v. Rhodes*, 1 Mees. & Welsb. R. 153; *Wyseman v. Lyman*, 7 Mass. R. 286; *Harris v. Johnston*, 3 Cranch, R. 311. See also ante, § 979 *a*, and cases cited. See *supra*.

<sup>2</sup> *Holcomb v. Stimpson*, 8 Verm. R. 141; *Babcock v. Hawkins*, 23 Ibid. 561; *Vedder v. Vedder*, 1 Denio, R. 257.

be founded on an additional consideration, or take in other matters than those which related to the original contract, and be binding on the original promisor, the remedy would seem to be on the substituted contract.<sup>1</sup> But where there is no new consideration, and the new promise is not the result of a compromise or settlement of a disputed claim, or not a new arrangement of various claims, the taking of a promissory note in payment of a debt would only operate as a temporary suspension of the debt. So, also, the acceptance of an order on a third person, agreed to by such person, would only temporarily suspend the right to recover on the original claim, unless it were accepted in full satisfaction, the party accepting it taking the risk.<sup>2</sup> Where, upon the taking of such order or promissory note, a receipt is given in full for the original claim, it would be strong evidence that the promissory note was intended to be a full satisfaction of the claim.<sup>3</sup> In all cases, however, the question whether it was so intended or not depends upon the circumstances of the case. The only rule that can be laid down is that if the new promise be taken in full payment of a debt, it is a good accord with satisfaction; if it be not so taken, it is not a good accord with satisfaction.

§ 982 b. Accord with satisfaction to one defendant, is, in general, a bar to all;<sup>4</sup> but an acceptance from one of two obligors, severally liable, of a smaller sum, in satisfaction of a larger, will not operate as a bar to an action against the other

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<sup>1</sup> *Ibid.* *Good v. Cheesman*, 2 Barn. & Adolph. R. 328; *Cartright v. Cooke*, 3 *Ibid.* 701; *Bayley v. Homan*, 3 *Bing. N. C. R.* 921; *Pope v. Tunstall*, 2 *Pike*, R. 209; *Wentworth v. Bullen*, 9 *Barn. & Cres. R.* 850.

<sup>2</sup> *Hawley v. Foote*, 19 *Wend. R.* 516. See ante, ch. XVI.; *Lewis v. Lyster*, 2 *Cromp. Mees. & Rosc. R.* 704.

<sup>3</sup> *Babcock v. Hawkins*, 23 *Verm. R.* 561.

<sup>4</sup> *Com. Dig. Accord*, A. 1; 2 *Greenl. Evid.* § 30; *Strang v. Holmes*, 7 *Cow. R.* 224; *Dufresne v. Hutchinson*, 3 *Taunt. R.* 117.

obligor.<sup>1</sup> So, also, a payment to one of joint plaintiffs of his part of damages is no bar to the other.<sup>2</sup> But if full payment be made to one of several plaintiffs, it is sufficient, although no authority appear from the others to make the agreement.<sup>3</sup> *A fortiori*, if, by agreement, each party be authorized to make or to accept payment in behalf of all, an acceptance or payment by one is conclusive. Thus, the acceptance of the negotiable note of one partner is a good satisfaction and discharge of the partnership debt.<sup>4</sup>

§ 982 c. Whether an accord, with an unaccepted *tender of satisfaction*, be a sufficient defence, does not seem to be settled.<sup>5</sup> If the accord be to accept a lesser sum than a debt, in satisfaction of it, there must be an actual acceptance in order to constitute a defence to the debt, and a mere tender is insufficient.<sup>6</sup> Thus, an agreement by creditors to accept five shillings and sixpence in the pound, in full satisfaction of their claims, was held to create no bar to an action for the full debt, there being no consideration to support the agreement. But where there is a sufficient consideration to support the agreement, it seems that a tender, though unaccepted, would be a

<sup>1</sup> Field *v.* Robins, 8 Adolph. & Ell. R. 91; Warren *v.* Skinner, 20 Conn. R. 559; Worthington *v.* Wigley, 3 Bing. N. C. R. 454; Smith *v.* Bartholemew, 1 Metcalf, R. 276.

<sup>2</sup> Clark *v.* Dinsmore, 5 N. Hamp. R. 136.

<sup>3</sup> Wallace *v.* Kelsall, 7 Mees. & Welsb. R. 264.

<sup>4</sup> Story on Partnership, § 370; Thompson *v.* Percival, 5 Barn. & Adolph. R. 925.

<sup>5</sup> See 2 Greenleaf on Evidence, § 31; Bradley *v.* Gregory, 2 Camp. R. 383; Coit *v.* Houston, 3 Johns. Cas. R. 243; Russell *v.* Lytle, 6 Wend. R. 390; Hawley *v.* Foote, 19 Ibid. 516; Allen *v.* Harris, 1 Lord Raym. R. 122; James *v.* David, 5 T. R. 141; Gabriel *v.* Dresser, 29 Eng. Law & Eq. R. 268; Hall *v.* Flockton, 14 Q. B. R. 380.

<sup>6</sup> Heathcote *v.* Cruikshanks, 2 T. 24. So, also, Tassall *v.* Shane, Cro. Eliz. R. 193; Balster *v.* Baxter, Ibid. 104; Lynn *v.* Bruce, 2 H. Black. R. 317; Clark *v.* Dinsmore, 5 N. Hamp. R. 136.

bar to an action.<sup>1</sup> So, also, where a different mode of payment from that received by the original claim is substituted for it by agreement, a tender according to such agreement will be sufficient, if it appear to have been a complete satisfaction. Thus, where the holder of a promissory note agreed to accept payment in coats at a stipulated price, a tender of the coats, though refused, was considered as sufficient to bar an action on the note.<sup>2</sup>

§ 982 d. In England, accord and satisfaction must be formally pleaded in all cases.<sup>3</sup> But in this country, it may be given in evidence under the general issue in *assumpsit*, and in actions on the case,—but it must be specially pleaded in debt, covenant, and trespass.<sup>4</sup> The plea of accord and satisfaction may be *proved* by lapse of time and the acquiescence of the parties; and the lapse of twenty years after damages sustained by a breach of covenant against incumbrances, was held, in one case, to be a sufficient proof of the plea, unless rebutted by other evidence.<sup>5</sup>

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<sup>1</sup> Heathcote *v.* Cruikshanks, 2 T. R. 24; Cartwright *v.* Cooke, 3 Barn. & Adolph. R. 701; Coit *v.* Houston, 3 Johns. Cas. 243.

<sup>2</sup> Coit *v.* Houston, 3 Johns. Cas. 243; James *v.* David, 5 T. R. 141; Hawley *v.* Foote, 19 Wend. R. 516. But see Russell *v.* Lytle, 6 Wend. R. 390.

<sup>3</sup> Baillie *v.* Moore, 8 Adolph. & Ell. R. (n. s.) 496; Weston *v.* Foster, 2 Bing. N. C. 693; 1 Chitt on Plead. 418, 426, 429, 441.

<sup>4</sup> Greenleaf on Evid. § 29.

<sup>5</sup> Jenkins *v.* Hopkins, 9 Pick. R. 543.

## CHAPTER VI.

## ARBITRAMENT AND AWARD.

§ 983. CONNECTED with the last defence which we have considered is another, which is called the *plea of Arbitrament and Award*. An arbitrament, or award, is the judgment or decree of persons elected by the parties to decide upon the matter in controversy between them. A submission to arbitrament, as well as the award, may be made either by deed or parol.<sup>1</sup>

§ 984. There is this difference between an accord, and satisfaction, and an award, that in an accord, present satisfaction must be pleaded in all cases; but in an action for a *tort*, a previous award of damages, payable at a future day, may be pleaded in bar of such action, at any time before the day on which the damages are payable.<sup>2</sup> So, also, where, in an action for a *tort*, the award is made upon a submission, giving mutual remedies to each party, in case of non-performance, it may be pleaded in bar to an action on the original cause of action, although it be not performed.<sup>3</sup>

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<sup>1</sup> Comyn, Dig. Arbitrament, D. 1, E. 20. As to the nature and binding character of a submission, see Stewart *v.* Cass, 16 Verm. R. 663; Valentine *v.* Valentine, 2 Barb. Ch. R. 430; Howard *v.* Sexton, 4 Comst. R. 157.

<sup>2</sup> Bacon, Abr. Arbitrament, G. note.

<sup>3</sup> Gascoyne *v.* Edwards, 1 Younge & Jerv. R. 19; Allen *v.* Milner, 2 Cromp. & Jerv. R. 53.

§ 985. But in an action for debt, an award ascertaining the debt, and its amount, and directing payment thereof, cannot be pleaded in bar of an action upon the original demand; because the money, until paid, is due in respect to the original demand. Where the demand, however, is for the delivery of goods, and the award directs a payment of money, the award may be pleaded in bar; because it alters the nature of the demand.<sup>1</sup>

§ 985 a. An award should, in the first place, be made *pursuant to the terms of the submission*. Yet if it exceed them and determine matters not submitted, it will only be void as to such matters;<sup>2</sup> unless the matters in respect to which it is void be so complicated with the others, or so conditioned upon them, that the two cannot be separated, in which case the whole award is void.<sup>3</sup> Thus, if the award be that each party shall do an act, and the act to be done by one party is beyond the submission, and is the consideration for the other act with-

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<sup>1</sup> *Allen v. Milner*, 2 C. & J. R. 53.

<sup>2</sup> *Body v. Cox*, 4 Dowl. & Lowndes, R. 75; *Bacon, Abr. Arbitrament*, E. 8, 19; *Aitcheson v. Cargey*, 2 B. & C. R. 170; *Butler v. The Mayor*, 1 Hill, R. 489; *Manser v. Heaver*, 3 Barn. & Adolph. R. 295; *Thorpe v. Cole*, 2 Cromp. Mees. & Rosc. R. 377; *Auriol v. Smith*, 1 Turn. & Russ. R. 128; *Butler v. The Mayor of N. Y.* 1 Hill, R. 495; *Nichols v. The Rensselaer Co. Mutual Ins. Co.* 22 Wend. R. 125; *Rixford v. Nye*, 20 Verm. R. 132; *Addison v. Gray*, 2 Wilson, R. 293.

<sup>3</sup> *Lincoln v. Whittenton Mills*, 12 Metcalf, R. 31. In this case Wild, J., said: "This case turns on the question whether the award of arbitrators, relied on in the defence, is valid and binding on the parties to the present suit. An award is in the nature of a judgment, and, to be valid, must be certain and decisive as to the matter submitted, so that it shall not be a cause of a new controversy. Samon's case, 5 Co. 77, Bac. Ab. Arbitrament and Award, E. 2. And although an award may be good in part, and in part void, yet this rule applies only to awards in which the parts of the awards are distinct and independent of each other. So an award may be conditional; but if the condition leads to a new controversy, the award is void." See, also, *Johnson v. Latham*, 4 Eng. Law & Eq. R. 203; *Schuyler v. Van Der Veer*, 2 Caines' Cas. 235.

in the submission, the award will be void.<sup>1</sup> Wherever the objectionable matters cannot be separated from those which are good, the award is void as to all.<sup>2</sup>

§ 985 b. Where the award is *defective*, and does not decide upon all the matters referred, it is bad; for the decision of the whole may be a condition precedent, or the essential consideration of the submission.<sup>3</sup> But if it be made in general terms, it will be presumed to cover the whole matters submitted; and a verdict for one or other party, when intelligible and certain, will be sufficient, although it be not said to be made "of and concerning the premises."<sup>4</sup> So, also, if the submission be "of all claims," an award of all claims, of which the arbitrators had knowledge, is good, although, in fact, there were other claims not brought forward by the parties.<sup>5</sup> And in order to impeach an award, made in pursuance of a conditional submission, on the ground only of part of the matters being decided, the party must *distinctly* show, that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them.<sup>6</sup>

§ 985 c. In the next place, an award must be *certain*. But

<sup>1</sup> McNear *v.* Bailey, 18 Maine R. 251; Sutton *v.* Dickinson, 9 Leigh, R. 142.

<sup>2</sup> Comyn, Dig. Arbitrament, E. 19; Auriol *v.* Smith, 1 Turn. & Russ. R. 128; Stone *v.* Phillips, 4 Bing. R. (N. S.) 40; Culver *v.* Ashley, 17 Pick. R. 98.

<sup>3</sup> Stone *v.* Phillips, 4 Bing. R. (N. S.) 39, 40; Houston *v.* Pollard, 9 Metcalf, R. 164; Com. Dig. Arbitrament, E. 4, E. 5; Boston Water Power Co. *v.* Gray, 6 Metcalf, R. 158; Howard *v.* Cooper, 1 Hill, R. 44.

<sup>4</sup> Gray *v.* Gwennap, 1 Barn. & Ald. 106; Houston *v.* Pollard, 9 Metcalf, R. 169; Parsons *v.* Aldrich, 6 N. Hamp. R. 264; Emery *v.* Hitchcock, 12 Wend. R. 157.

<sup>5</sup> Bacon, Abr. Arbitrament, E. 10; Warfield *v.* Holbrook, 20 Pick. R. 634; Post, § 986 a.

<sup>6</sup> Per Mr. Justice Trimble in Karthaus *v.* Ferrer, 1 Peters, S. C. R. 227; Ingram *v.* Milnes, 8 East, R. 445; McNear *v.* Bailey, 18 Maine R. 251; Sutton *v.* Dickenson, 9 Leigh, R. 142.

this certainty is only to a common intent, and all that is required is, that the award should be so certain as to leave no fair and reasonable doubt as to its meaning.<sup>1</sup> Therefore, an award that the surety of a debt for which A. was bound, pay, without stating the sum, is void for uncertainty.<sup>2</sup> So, also, where an action for polluting the water of a watercourse was referred to an arbitrator, with power to regulate the enjoyment of the water, and the award directed a verdict to be entered for the plaintiff, and ordered that the defendant should take "all proper and reasonable precautions" for preventing the water from being rendered unfit for the plaintiff's use, and should purify and cleanse "as far as the same can be purified and cleansed by the ordinary and most approved process of filtering," it was held to be void for uncertainty.<sup>3</sup> Technical precision and certainty are not, however, required in an award; and it will be sufficient, if it be expressed in such language that plain men acquainted with the subject-matter can understand it, however short and elliptical it be.<sup>4</sup> But it must appear on the award, with reasonable certainty, what the respective rights of the parties are.<sup>5</sup> The mere fact, that the sum adjudged to be paid is not ascertained, will not render the

<sup>1</sup> Purdy *v.* Delavan, 1 Caines' Cas. 315; Wood *v.* Earl, 5 Rawle, R. 44; Case *v.* Ferris, 2 Hill, R. 75; Doolittle *v.* Malcolmb, 8 Leigh, R. 608; Waite *v.* Barry, 12 Wend. R. 377; Kingston *v.* Kincaid, 1 Wash. C. C. R. 448.

<sup>2</sup> Bacon, Abr. Arbitrament, E. 11; Crosbie *v.* Holmes, 3 Dowl. & Lown. R. 566. See, also, In re Morphett, 10 Jurist, (Eng.) 546; Schuyler *v.* Van Der Veer, 2 Caines, R. 235; Stanley *v.* Chappell, 8 Cowen, R. 235.

<sup>3</sup> Stonehewer *v.* Farrar, 6 Adolph. & Ell. R. 730. But this case has been doubted. See Johnson *v.* Latham, 4 Eng. Law & Eq. R. 206.

<sup>4</sup> Butler *v.* The Mayor &c. of N. Y. 1 Hill, R. 493; Matson *v.* Trower, Ry. & Mood. N. P. Cas. 17; Hays *v.* Hays, 23 Wend. R. 363; Wood *v.* Earl, 5 Rawle, R. 44; Nichols *v.* Rensselaer Mutual Ins. Co. 22 Wend. R. 125; Skeel *v.* Chickering, 7 Metcalf, R. 316.; Pearson *v.* Archbold, 11 Mees. & Welsb. R. 477; Lutz *v.* Linthicum, 8 Peters, S. C. R. 165; Bigdon *v.* Maynard, 4 Cushing, R. 317.

<sup>5</sup> Houston *v.* Pollard, 9 Metcalf, R. 169; Rider *v.* Fisher, 3 Bing. N. Cas. 874; Schuyler *v.* Van Der Veer, 2 Caines' Cas. 235; Lincoln *v.* Whittenton Mills, 12 Met. R. 31.

award void for uncertainty, if it can be made certain, according to the maxim, "*Id certum est quod certum reddi potest.*" Therefore, an award that a person pay the "taxable costs" of a suit;<sup>1</sup> or that the plaintiff shall pay the executors of A., is sufficiently certain, because it can be made so.<sup>2</sup> So, also, an award in general terms, as by ordering a verdict for one of the parties,<sup>3</sup> or in the alternative,<sup>4</sup> is sufficiently certain. But awards to give "good security"<sup>5</sup> for a certain sum without saying what security, or that a party should pay "£5 and other small things" or should give up "several books"<sup>6</sup> or should pay as "much as was due in conscience"<sup>7</sup> have been held to be void for uncertainty.

§ 985 d. In the next place, an award must be *final*.<sup>8</sup> An award, therefore, to abide by the arbitrament of another person is void.<sup>9</sup> So, also, where arbitrators determined, that the plaintiffs should be entitled to a credit of a certain sum on account of sales of land to the defendant, provided, "they shall grant or cause to be granted to (the defendant) a clear, unencumbered and satisfactory title," without limiting any time within which it should be made, it was held,—that as this

<sup>1</sup> Com Dig. Arbitrament, E. 11; Macon *v.* Crump, 1 Call, R. 575; Buckland *v.* Conway, 16 Mass. R. 396; Wright *v.* Smith, 19 Verm. R. 110.

<sup>2</sup> Grier *v.* Grier, 1 Dall. R. 173; Jackson *v.* Ambler, 14 Johns. R. 96.

<sup>3</sup> Ante, § 985 b; Gray *v.* Gwennap, 1 Barn. & Ald. R. 107.

<sup>4</sup> Commonwealth *v.* Proprietors &c. 7 Mass. R. 399; Wharton *v.* King, 2 Barn. & Adolph. R. 528; Thornton *v.* Carson, 7 Cranch, R. 596; Lee *v.* Elkins, 12 Mod. R. 585.

<sup>5</sup> Jackson *v.* De Long, 9 Johns. R. 43; Barnet *v.* Gilson, 3 Serg. & Rawle, R. 340; Tipping *v.* Smith, 2 Strange, R. 1024; Thinne *v.* Rigby, Cro. Jac. R. 314. But see Peck *v.* Wakely, 2 McCord, 279, where the term "sufficient indemnity was held to be good."

<sup>6</sup> Cockson *v.* Ogle, 1 Lutw. R. 550.

<sup>7</sup> Watson *v.* Watson, Styles, R. 28.

<sup>8</sup> See Goode *v.* Waters, 1 Eng. Law & Eq. R. 181; Nichols *v.* Rensselaer Mutual Ins. Co. 22 Wend. R. 125.

<sup>9</sup> Bacon, Abr. Arbitrament, E. 15.

left the question, whether the credit should or should not be allowed, open,—the award was not final, and therefore bad.<sup>1</sup> An award is regarded as final, when it is an absolute conclusive adjudication of the matter in dispute.<sup>2</sup> And when there are claims on both sides for debts, or pecuniary claims, or damages capable of being liquidated and reduced to a sum certain, if the arbitrators, professing to decide on the whole subject, find a balance due from one to the other, such an award is final and conclusive, although the particulars from which that balance resulted, be not stated.<sup>3</sup> The mere fact, that the award is conditional does not make it bad, if the condition be clear and certain, and no question be left as to the rights of the parties.<sup>4</sup> Thus, an award that one party should pay the other a certain sum at a stated time, unless before that time it should be collected from some other source, is good.<sup>5</sup> So, also, an award conditioned upon the decision of an expert as to some particular technical detail or point would be good.<sup>6</sup> But the arbitrators must themselves not only decide the case, but decide it finally, and any delegation or reservation of authority by them, would render the award inoperative.<sup>7</sup>

§ 985 e. It is also a rule that an award should be *mutual*,

<sup>1</sup> Carnochan *v.* Christie, 11 Wheat. R. 446.

<sup>2</sup> Per Mr. Justice Trimble, in Karthaus *v.* Ferrer, 1 Peters, S. C. R. 230.

<sup>3</sup> Houston *v.* Pollard, per Mr. Chief Justice Shaw, 9 Metcalf, R. 169.

<sup>4</sup> Collet *v.* Podwell, 2 Keble, R. 670; Furser *v.* Prowd, Cro. Jac. R. 423; Roll. Abr. tit. Arbit. (H.) Pl. 8.

<sup>5</sup> Williams *v.* Williams, 11 Smedes & Marsh. R. 393.

<sup>6</sup> Emery *v.* Wase, 5 Ves. R. 846; Hopcraft *v.* Hickman, 2 Sim. & Stew. R. 130; Anderson *v.* Wallace, 3 Cl. & Fin. R. 26; Scale *v.* Fothergill, 8 Beav. R. 361; Winter *v.* Garlick, Salk. R. 75.

<sup>7</sup> Ibid. See, also, Archer *v.* Williamson, 2 Harr. & Gill, R. 62; Tomlin *v.* The Mayor, &c., of Fordwich, 5 Adolph. & Ell. R. 147; Manser *v.* Heaver, 3 Barn. & Adolph. R. 295; Tandy *v.* Tandy, 9 Dowl. P. C. R. 1044; Levezey *v.* Gorgas, 4 Dallas, R. 71; Lingood *v.* Eade, 2 Atk. R. 501; Glover *v.* Barrie, Salk. R. 71.

and cannot give an advantage to one party without an equivalent to the other. But it is now quite settled that this mutuality need not be expressly stated in the award, if it actually exist, and if the award be for the payment of a sum or the performance of an act, the discharge of the other party would be necessarily implied.<sup>1</sup>

§ 985 *f.* In the next place, an award must be *possible*, *legal*, and *reasonable*. An award, therefore, to pay at a day past,— or to release a right in consideration of a trespass,— or to cause a stranger to do a thing, which he has no legal or equitable right to do,— is void.<sup>2</sup> But if the award be possible at

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<sup>1</sup> Purdy *v.* Delavan, 1 Caines' Cas. 319. In this case Kent, J., said: "It may not be unnecessary to notice another rule applicable to awards, which is, that they must be *mutual*, or not give an advantage to one party, without an equivalent to the other. Kyd, 148. But this mutuality is nothing more than that the thing awarded to be done, should be a final discharge of all future claim by the party in whose favor the award is made against the other *for the causes submitted*, or, in other words, that it shall be final. Thus in Baspole's Case, (8 Co. 97, b.) the submission was general, of all matters and demands; and the award was, that one party should pay to the other a certain sum in consideration of a debt long due, and for his costs, and said no more. The award was held good; for the one party received the money, and the other was discharged from the debt, which was a sufficient reciprocity. Com. Rep. 328. So, where a certain alleged trespass was submitted to arbitrators, to arbitrate concerning the said trespass, and divers suits concerning the same pending between the parties, and the award was, that the defendants should pay a certain sum and certain costs in and about the suit arising; it was objected, that the award was on one side only, for it directed nothing as to the other party, there being no releases awarded, nor words of satisfaction used; but the award was, upon demurrer, held good, and, therefore, it may now be safely laid down in the words of Mr. Kyd, (p. 153) that an award need not contain any equivalent terms; for a discharge to the other party must necessarily be presumed from the payment of the sum or the performance of the act." See, also, Weed *v.* Ellis, 3 Caines' Cas. 253; Byers *v.* Van Deusen, 5 Wend. R. 268; Jones *v.* Boston Mill Corporation, 6 Pick. R. 148; Onion *v.* Robinson, 15 Verm. R. 510.

<sup>2</sup> Bacon, Abr. Arbitrament, E. 12, 13; Alder *v.* Saville, 5 Taunt. R. 454;

the time, it will be good, although it afterward be rendered impossible by the act of the party himself, or of a stranger.<sup>1</sup> An award to pay a less sum, in satisfaction of a greater, is good;<sup>2</sup> and generally an award will not be set aside for unreasonableness, unless a strong case be made out; nor will it be considered unreasonable merely because it imposes a burden on one party only.<sup>3</sup>

§ 985 g. In the *construction* of awards, it is a well settled rule, that, it is to be favorable, and no intendment shall be indulged to overturn it, but every reasonable intendment shall be allowed to uphold it. Thus, if a submission be of all actions, real and personal, and the award be only of actions personal, the award is good, for it shall be presumed no actions real were depending between the parties.<sup>4</sup>

§ 985 h. In general, arbitrators have full power to decide upon all questions both of law and of fact, which arise either directly or indirectly in the consideration and adjudication of the question submitted to them, as incident to the decision of questions of fact; they have power to decide all questions as to the admission or rejection of evidence, as well as the credit due to evidence, and the inferences of fact to be drawn from it; and also, unless they be limited by the terms of the submission, they have authority to decide all questions of law, necessarily involved in the matters submitted. And their decision upon matters of law and of fact, within the scope of their

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Maybin *v.* Coulon, 4 Dall. R. 298; Turner *v.* Swainson, 1 Mees. & Welsb. R. 572.

<sup>1</sup> Ibid. 2 Mod. R. 27; ante, Conditional Contracts, § 32.

<sup>2</sup> Ibid. 2 Cro. R. 447; 2 Mod. R. 303.

<sup>3</sup> Wood *v.* Griffith, 1 Swanst. R. 43; Brown *v.* Brown, 1 Vern. R. 157; Waller *v.* King, 9 Mod. R. 63; Hardy *v.* Innes, 6 J. B. Moore, R. 574; Earl *v.* Stocker, 2 Vern. R. 251.

<sup>4</sup> Karthaus *v.* Ferrer, 1 Peters, S. C. R. 228, per Justice Trimble; Kyd, R. 72; Baspole's Case, 8 Co. R. 98; Boston Water Power Co. *v.* Gray, 6 Met. R. 166.

authority, is conclusive, and has the effect of a final judgment.<sup>1</sup>

§ 985 i. The question whether a mistake as to the law will invalidate an award, depends solely on the terms of the submission. If the submission require that the award should be decided according to the principles of law, a decision contrary to the law would avoid the award. But if the parties have, either expressly or impliedly, submitted all questions of law or fact to the decision of the arbitrators, their decision is final, whether it be well founded in law or not.<sup>2</sup> If, however, no

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<sup>1</sup> Boston Water Power Co. v. Gray, 6 Met. R. 166, per Mr. Ch. Justice Shaw. See also Jones v. Boston Mill Corp. 6 Pick. R. 148; Faviell v. Eastern Counties Railway Co. 2 Excheq. R. 344; Fuller v. Fenwick, 3 Com. B. R. 705; Greenough v. Rolfe, 4 N. Hamp. R. 357; Cramp v. Symons, 1 Bing. R. 104.

<sup>2</sup> The rule is thus ably laid down by Mr. Ch. Justice Shaw in Boston Water Power Corp. v. Gray, 6 Met. R. 131. He says: "If the submission be of a certain controversy, expressing that it is to be decided conformably to the principles of law, then both parties proceed upon the assumption that their case is to be decided by the true rules of law, which are presumed to be known to the arbitrators, who are then only to inquire into the facts, and apply the rules of law to them, and decide accordingly. Then if it appears by the award, to a court of competent jurisdiction, that the arbitrators have decided contrary to law,—of which the judgment of such a court, when the parties have not submitted to another tribunal, is the standard,—the necessary conclusion is, that the arbitrators have mistaken the law, which they were presumed to understand; the decision is not within the scope of their authority, as determined by the submission, and is for that reason void. But when the parties have, expressly or by reasonable implication, submitted the questions of law, as well as the questions of fact, arising out of the matter of controversy, the decision of the arbitrators on both subjects is final. It is upon the principle of *res judicata*, on the ground that the matter has been adjudged by a tribunal which the parties have agreed to make final, and a tribunal of last resort for that controversy; and therefore it would be as contrary to principle, for a court of law or equity to rejudge the same question, as for an inferior court to rejudge the decision of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction, or a revising power acting directly upon the judgment alleged to be erroneous.

"It has sometimes been made a question, whether the court will not set

reservation be made in the submission, the parties are presumed to agree that every question of law and fact, nec-

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aside an award, on the ground of mistake of the law, when the arbitrator is not a professional man, and decline inquiry into such mistake, when he was understood, from his profession, to be well acquainted with the law. Some of the earlier cases may have countenanced this distinction. But the probability is, that this distinction was taken, rather by way of instance to illustrate the position, that when the parties intended to submit the questions of law as well as of fact, the award should be final, but otherwise not: which we take to be the true principle. But we think the more modern cases adopt the principle, that inasmuch as a judicial decision upon a question of right, by whatever forum it is made, must almost necessarily involve an application of certain rules of law to a particular statement of facts, and as the great purpose of a submission to arbitration usually is, to obtain a speedy determination of the controversy, a submission to arbitration embraces the power to decide questions of law, unless that presumption is rebutted by some exception or limitation in the submission. We are not aware that there is any thing contrary to the policy of the law, in permitting parties thus to substitute a domestic forum for the courts of law, for any good reason satisfactory to themselves; and having done so, there is no hardship in holding them bound by the result. *Volenti non fit injuria.* On the contrary, there are obvious cases, in which it is highly beneficial. There are many cases, where the parties have an election of forum; sometimes it is allowed to the plaintiff, and sometimes to the defendant. It may depend upon the amount, or the nature of the controversy, or the personal relations of one or other of the parties. As familiar instances in our own practice, one may elect to proceed in the courts of the United States, or in a State court; at law or in equity; in a higher or lower court. In either case, a judgment in one is, in general, conclusive against proceeding in another. A very common instance of making a judgment conclusive by consent, is where a party agrees, in consideration of delay, or some advantage to himself, to make the judgment of the court of common pleas conclusive, where, but for such consent, he would have a right to the judgment of the higher court.

"But where the whole matter of law and fact is submitted, it may be open for the court to inquire into a mistake of law, arising from matter apparent on the award itself; as where the arbitrator has, in his award, raised the question of law, and made his award in the alternative, without expressing his own opinion; or, what is perhaps more common, where the arbitrator expresses his opinion, and conformably to that opinion, finds in favor of one of the parties; but if the law is otherwise, in the case stated, then his award is to be for the

essary for the decision, is to be included in the arbitration.<sup>1</sup>

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other party. In such case, there is no doubt, the court will consider the award conclusive as to the fact, and decide the question of law thus presented.

"Another case, somewhat analogous, is where it is manifest, upon the award itself, that the arbitrator intended to decide according to law, but has mistaken the law. Then it is set aside, because it is manifest that the result does not conform to the real judgment of the arbitrator. For then, whatever his authority was to decide the questions of law, if controverted, according to his own judgment, the case supposes that he intended to decide as a court of law would decide; and therefore, if such decision would be otherwise, it follows that he intended to decide the other way." See, also, 2 Story, *Equity Jurisp.* § 1454-1459; *Ching v. Ching*, 6 Ves. R. 282; *Smith v. Thorndike*, 8 Greenl. R. 119; *Bigelow v. Newell*, 10 Pick. R. 348; *Kleine v. Catara*, 2 Gall. R. 70; *Young v. Walter*, 9 Ves. R. 364; *Johns v. Stevens*, 3 Verm. R. 314; *Underhill v. Van Cortlandt*, 2 Johns. Ch. R. 339; *Chace v. Westmore*, 13 East, R. 357; *Campbell v. Twenlow*, 1 Price, R. 81; *Roosevelt v. Thurman*, 1 Johns. Ch. R. 220.

<sup>1</sup> 2 Story, *Equity Jurisp.* § 1454; *Knox v. Symmonds*, 1 Ves. jr. R. 369; *Shepard v. Merrill*, 2 Johns. Ch. R. 276. In *Kleine v. Catara*, 2 Gall. R. 61, Mr. Justice Story says: "Under a general submission, therefore, the arbitrators have, rightfully, a power to decide on the law and the fact; and an error in either respect ought not to be the subject of complaint by either party, for it is their own choice to be concluded by the judgment of the arbitrators. Besides, under such a general submission, the reasonable rule seems to be, that the referees are not bound to award upon the mere dry principles of law applicable to the case before them. They may decide upon principles of equity and good conscience, and may make their award *ex a quo et bono*. We hold, in this respect, the doctrine of Lord Talbot in the South Sea Company *v. Bumbstead*, of Lord Thurlow in *Knox v. Simonds*, of the King's Bench in *Anistie v. Goff*, and of the common pleas in *Delver v. Barnes*. If, therefore, under an unqualified submission, the referees meaning to take upon themselves the whole responsibility, and not to refer it to the court, to decide differently from what the court would on a point of law, the award ought not to be set aside. If, however, the referees mean to decide according to law and mistake, and refer it to the court to review their decision, (as in all cases, where they specially state the principles, on which they have acted, they are presumed to do,) in such cases, the court will set aside the award, for it is not the award which the referees meant to make, and they acted under a mistake. On the other hand, if knowing what the law is, they mean not to be bound

§ 985*j*. If, however, it appear, by the award itself that the arbitrator intended to decide according to the law, but made a mistake therein, the award would be set aside, on the ground that it does not conform to the actual judgment and intention of the arbitrator.<sup>1</sup> So, also, where the arbitrator decides the facts alternatively,—stating that if the law be as he supposes it, he finds for one party; but if the law be otherwise, he finds for the other party,—the award will be conclusive as to the party, and the law will be ruled by the court.<sup>2</sup>

§ 985*k*. An award will be set aside for a *mistake of fact*, apparent in the award itself, whenever the mistake is in an important and material particular, so that, had it been seasonably known, it would have varied the result.<sup>3</sup> So, also, the same rule holds, where the arbitrators are satisfied of their mistake, and state it, although it do not appear on the face of

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by it, but to decide, what in equity and good conscience ought to be done between the parties, their award ought to be supported, although the whole proceedings should be apparent on the face of the award. And this, in our opinion, notwithstanding some contrariety, is the good-sense to be extracted from the authorities."

<sup>1</sup> Boston Water Power Co. v. Gray, 6 Metcalf, R. 168, where this whole matter is ably stated. Richardson v. Nourse, 3 Barn. & Ald. R. 240; Watson on Arb. 232; 2 Story, Eq. Jurisp. § 1455, and cases cited; Kleine v. Catara, 2 Gall. R. 70; Young v. Walter, 9 Ves. R. 366.

<sup>2</sup> Ibid.

<sup>3</sup> 2 Story, Equity Jurisp. 1456, and cases cited; Boston Water Power Co. v. Gray, 6 Metcalf, R. 168. In this case Mr. Ch. Justice Shaw says: "Another ground for setting aside the award is a mistake of fact, apparent upon the award itself; and this is held to invalidate the award, upon the principle stated in the preceding proposition, that the award does not conform to the judgment of the arbitrators, and the mistake, apparent in some material and important particular, shows that the result is not the true judgment of the arbitrators. The mistake, therefore, must be of such a nature, so affecting the principles upon which the award is based, that if it had been seasonably known and disclosed to the arbitrators, if the truth had been known and understood by them, they would probably have come to a different result." See, also, Underhill v. Van Cortlandt, 2 Johns. Ch. R. 339, for a full examination of the question by Mr. Chancellor Kent.

the award.<sup>1</sup> But this rule would not apply to cases, where the arbitrators have come to an erroneous conclusion from the evidence, though the party impeaching it offer to demonstrate its incorrectness. But the mistake must be of a fact inadvertently assumed, which can be shown to have been incorrectly assumed.<sup>2</sup>

§ 985*l.* Again, a court of equity will set aside an award where it appears, that there has been fraud, corruption, partiality, or any other misconduct on the part of the arbitrators, or fraud and imposition by the party attempting to set up the award, by which the arbitrators were misled.<sup>3</sup> But in a suit at common law, no extrinsic circumstances or matter of fact, *dehors the award*, can be pleaded, or given in evidence to defeat it.<sup>4</sup>

§ 986. Where a reference is made to arbitration, all matters relating to such reference, if insisted upon as a defence, or claim, should be brought forward, before the award is made; for the same matter cannot be made the subject of a new action.<sup>5</sup> But it may be averred and proved by parol evidence, that the cause of the second action was not in issue in the former, and was not decided.<sup>6</sup>

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<sup>1</sup> 2 Story, Equity Jurisp. § 1456.

<sup>2</sup> Ibid.

<sup>3</sup> 2 Story, Equity Jurisp. § 1452; Harris *v.* Mitchell, 2 Vern. R. 485; Chicot *v.* Lequesne, 2 Ves. R. 315; Brown *v.* Brown, 1 Vern. R. 159; Lingsood *v.* Eade, 2 Atk. R. 501; Boston Water Power Co. *v.* Gray, 6 Metcalf, R. 168.

<sup>4</sup> Ibid. Wills *v.* Maccarmick, 2 Wils. R. 148; Braddick *v.* Thompson, 8 East, R. 344; Bac. Abr. Arbit. K.; Kyd on Awards, ch. 7, p. 327. But see Boston Water Power Co. *v.* Gray, 6 Metcalf, R. 169.

<sup>5</sup> Smith *v.* Johnson, 15 East, R. 213; Dunn *v.* Murray, 9 Barn. & Cres. R. 780; s. c. 4 Man. & Ry. R. 571.

<sup>6</sup> Snider *v.* Croy, 2 Johns. R. 227; Phillips *v.* Berick, 16 Johns. R. 136; Webster *v.* Lee, 5 Mass. R. 334; Smith *v.* Whiting, 11 Mass. R. 445; Hodges *v.* Hodges, 9 Mass. R. 320; King *v.* Savory, 8 Cush. R. 309; Bixby *v.* Whitney, 5 Greenl. R. 192.

§ 986 a. Where, through mistake of their authority, or oversight, or accident, referees neglect or refuse to take into consideration and pass upon demands, within their authority, and brought before them by one or other of the parties, the award will be held bad, as not embracing all the matters submitted.<sup>1</sup> But where the parties omit or refuse to bring forward claims, the fact, that they were not passed upon, does not invalidate the award.<sup>2</sup> An award in pursuance of a submission is, however, conclusive as to all matters to which the submission extends, whether every particular included in the submission were laid before the arbitrators or not; and it may be pleaded in bar of any suit upon claims embraced in the submission.<sup>3</sup>

§ 987. An agreement between two parties, to refer any matter of dispute, arising under a contract, will not constitute a defence to an action; unless in pursuance of such agreement such a reference has been made and determined.<sup>4</sup> But the pendency of an arbitration will not be an answer to an action on a contract or debt.<sup>5</sup>

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<sup>1</sup> Per Ch. Justice Shaw, in *Warfield v. Holbrook*, 20 Pick. R. 534; *Robson v. Railston*, 1 Barn. & Adolph. R. 723; *Samuel v. Cooper*, 2 Adolph. & Ell. R. 752.

<sup>2</sup> *Warfield v. Holbrook*, 20 Pick. R. 534.

<sup>3</sup> *Dunn v. Murray*, 9 Barn. & Cres. R. 780; *Fidler v. Cooper*, 19 Wend. R. 285; *Emmet v. Hoyt*, 17 Wend. R. 410; *Smith v. Johnson*, 15 East, R. 213; *Green v. Danby*, 12 Verm. R. 338; *Warfield v. Holbrook*, 20 Pick. R. 534.

<sup>4</sup> *Kill v. Hollister*, 1 Wils. R. 129; *Thompson v. Charnock*, 8 T. R. 139; *Tattersall v. Groote*, 2 B. & P. R. 131; *Harris v. Reynolds*, 7 Adolph. & Ell. N. S. R. 71; *Peters v. Craig*, 6 Dana, R. 307; *Certain Logs of Mahogany*, 2 Sumner, R. 593.

<sup>5</sup> *Harris v. Reynolds*, 7 Adolph. & Ell. N. S. R. 71.

## CHAPTER VII.

## PENDENCY OF ANOTHER ACTION — VERDICT — JUDGMENT.

§ 988. THIS brings us to the consideration of another defence, namely:—The Pendency of another Action, or a Former Verdict or Judgment. And in the first place, as to the pendency of another action, the rule is, that while a suit is pending in one court, a suit upon the same cause of action, and between the same parties cannot be brought in another court, without discontinuing the former action.<sup>1</sup> But the previous suit must have been properly brought in order to render it an effectual bar, and if there were defects in its service, or any other formal cause by which it might be defeated, the second suit will not be abated thereby.<sup>2</sup> So, also, the former suit must have been entered in court and be actually pending therein at the time when the second suit is commenced.<sup>3</sup>

§ 988 *a.* In respect to the *cause* of action the rule is, that it should be of the same nature in both suits,—an action in tort being no bar to an action in contract,<sup>4</sup>—and that the courts

<sup>1</sup> Com. Dig. Abatement, H. 24; Bacon, Abr. Abatement, M.; Harley *v.* Greenwood, 5 B. & Ald. R. 101; Tracy *v.* Reed, 4 Blackf. R. 56; McKinsey *v.* Anderson, 4 Dana, R. 62; Wadleigh *v.* Veazie, 3 Sumner, R. 168.

<sup>2</sup> Downer *v.* Garland, 21 Verm. R. 362; Hill *v.* Dunlap, 15 Ibid. 645; Quinebaug Bank *v.* Tarbox, 20 Conn. R. 510.

<sup>3</sup> Smith *v.* Atlantic Ins. Co. 2 Foster, R. 21; Trenton Bank *v.* Wallace, 4 Halst. R. 83.

<sup>4</sup> Certain Logs of Mahogany, 2 Sumner, R. 592; Dudfield *v.* Warden, Fitzgibbons, R. 313.

in which it is brought should be of the same jurisdiction—an action at law being no bar to a suit in equity, nor the opposite.<sup>1</sup>

§ 988 b. In respect to the *parties* the rule is, that the previous suit must have been between the same parties and in the same capacity;<sup>2</sup> and that they must have held the same position therein as plaintiff and defendant. A suit against A. is not abated by a prior suit against B., although it be for the same cause.<sup>3</sup> So, a suit by A. against B. is not abated by a prior suit by a creditor of A. against him, in which B. is summoned as a trustee, although the second suit be for the same cause of action sought to be reached by the trustee process.<sup>4</sup> But the pendency of a suit by foreign attachment in one State is a good plea in abatement of a suit in the same cause of action in another State.<sup>5</sup> Yet a personal arrest or holding to bail in a suit in a foreign country cannot generally be pleaded in abatement.<sup>6</sup> But although it is well established that where the plaintiff is the same in both causes, the pendency of an action is a good plea in abatement, it seems to have been held in some early cases, that the defendants are not required to be

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<sup>1</sup> Peak *v.* Bull, 8 B. Monroe, R. 428; Colt *v.* Partridge, 7 Metcalf, R. 570; Haskins *v.* Lombard, 16 Maine R. 140; Blanchard *v.* Stone, 16 Verm. R. 234; Ralph *v.* Brown, 3 Watts & Serg. R. 395.

<sup>2</sup> Henry *v.* Goldney, 15 Mees. & Welsb. R. 494; Wadleigh *v.* Veazie, 3 Sumner, R. 165; Haskins *v.* Lombard, 16 Maine R. 140; Cornelius *v.* Vansdallen, 3 Penn. St. R. 434.

<sup>3</sup> Casey *v.* Harrison, 2 Dev. R. 244; Henry *v.* Goldney,<sup>7</sup> 15 Mees. & Welsb. R. 494; Thomas *v.* Freelon, 17 Verm. R. 138.

<sup>4</sup> Wadleigh *v.* Pillsbury, 14 N. Hamp. R. 373.

<sup>5</sup> Lord Holt, in Brook *v.* Smith, 1 Salk. R. 280; Embree *v.* Hanna, 5 Johns. R. 101; Carroll *v.* McDonogh, 10 Martin, Louis. R. 609; Wallace *v.* McConnell, 13 Peters, R. 136; 2 Kent, Comm. Lect. 27, p. 123.

<sup>6</sup> Bowne *v.* Joy, 9 Johns. R. 221; Mitchell *v.* Bunch, 2 Paige, R. 606; 2 Kent, Comm. Lect. 27, p. 122, 123, 135; Maule *v.* Murray, 7 T. R. 470; Salmon *v.* Wootton, 9 Dana, R. 422; Ostell *v.* Lepage, 10 Eng. Law & Eq. R. 250; McJilton *v.* Love, 13 Ill. R. 486; Russel *v.* Field, Stuart, (Canada,) R. 558.

the same in both suits." But this distinction does not now seem to obtain.<sup>1</sup>

§ 988 c. It seems, also, that the pendency of a suit in an in-

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<sup>1</sup> In *Wadleigh v. Veazie*, 3 Sumner, R. 167, Mr. Justice Story says: "The sole question arising in this case is, whether the pendency of another action in the State court for the recovery of the same land, in which the present defendant is plaintiff, and the present plaintiff is defendant, at the commencement of the present suit, is a good plea in abatement to this suit. I must say, that I know of no such plea at the common law; and there is no pretence to say, that any such plea is provided for by the laws of the United States. In all cases, in which the pendency of another action is pleadable at the common law to the second suit, two things most generally concur: first, that the second suit should be by the same plaintiff against the same defendant; and, secondly, that it should be for the same cause of action. The latter doctrine is universally true; for the plea is founded, as was said in *Sparry's case*, (5 Co. R. 61,) upon the maxim, *Nemo debet bis vexari, si constet curiae quod sit pro unâ et eadem causâ*. And unless the plaintiff be the same, the cause of action cannot be the same, since a grievance, or wrong, or injury to a plaintiff, sought to be redressed in one suit, can never be the same grievance, wrong, or injury, which the defendant in that suit seeks as plaintiff to redress in another suit. The wrong done to A. exclusively, can never, in any propriety of language, be called the same wrong done to B. exclusively, though it may arise from the same identical act. An action for an assault and battery brought by A. against B. for which he seeks damages, cannot be the same cause of action as an action for an assault and battery brought by B. against A., though it may arise out of the same transaction; for the injury to A. is not the injury to B. I am aware, that upon the other point there is some apparent diversity in the authorities. All of them agree, that the plaintiff must be the same, for otherwise the cause of action cannot, in a just, legal sense, be the same. But some of the authorities hold, or incline to hold, that if the plaintiff is the same, and the cause of action is the same, the defendants need not be the same in each suit. Thus, it has been said, that a suit in trespass by A. against B. may be pleaded in abatement of another suit for the same trespass against B. and C.; at least, it may be pleaded by B. The case of *Bedford v. Bishop of Exeter et al.*, (Hob. R. 137,) and *Rawlinson v. Oriett*, (Carth. R. 96,) may be cited on this point. But perhaps these cases are distinguishable; or at all events, may require further consideration. But I give no opinion on the point raised in them, because unnecessary upon the present occasion." . . . . See, also, *Colt v. Partridge*, 7 Metcalf, R. 570; *Haskins v. Lombard*, 16 Maine R. 140; *Henry v. Goldney*, 15 Mees. & Welsb. R. 494.

ferior court would not, in England, be a sufficient defence to an action in a superior court.<sup>1</sup> So, a suit in one of the State courts in this country would not be a good plea in abatement of a suit in one of the courts of the United States.<sup>2</sup> And wherever there is a defect in the jurisdiction and powers of the first court so that a complete remedy could not be

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<sup>1</sup> King *v.* Hoare, 13 Mees. & Welsb. R. 494-504 ; Laughton *v.* Taylor, 6 Ibid. 695 ; Brinsby *v.* Gold, 12 Mod. R. 204 ; Seers *v.* Turner, 2 Lord Raym. R. 1102 ; Sparry's case, 5 Coke, R. 62 *a*. But see, in this country, Smith *v.* The Atlantic M. F. Ins. Co. 2 Foster, R. 21 ; Wadleigh *v.* Veazie, 3 Sumner, R. 167.

<sup>2</sup> Wadleigh *v.* Veazie, 3 Sumner, R. 168. In this case Mr. Justice Story says: "But it is suggested, that this court possesses a sort of discretionary authority in cases of this sort, where there is a concurrent jurisdiction in the State court and in this court, to interfere to prevent a collision of jurisdictions and a conflict of decisions as to the title to the land. I know of no such authority. If the parties are rightfully before this court in a case within its jurisdiction, however unpleasant it may be to entertain a suit here, in regard to which there may possibly be a diversity both of verdict and judgment, from those given in the State court, I know not how that is to be avoided. I should deeply regret such an occurrence ; but still, I am not aware how the court can escape from its duty, in any case which Congress has confided to its jurisdiction. If a plaintiff should bring an ejectment in a State court, and should recover and be put into possession, and then the defendant, being a citizen of another State, should bring an ejectment in the Circuit Court of the United States, in the same State, to recover back possession of the land, I know of no power in the circuit court to stay or control the suit, or to refuse jurisdiction over the cause. Yet, in such a case, there may be directly conflicting verdicts or judgments on the same title. The case has often occurred ; and may in the future, as in the past, occur again. It is one of the unavoidable difficulties growing out of our complex system of government. The objection, if it has any force whatsoever, is aimed, if not at that system, at least at the propriety of allowing any concurrent jurisdiction whatsoever over the same subject-matter in the State courts and in the United States courts. Which courts, in such a conflict, ought to be invested with exclusive jurisdiction, is a point with which I do not intermeddle. Perhaps it will be found, upon full examination, that there is a great weight of argument on each side of the question, if a reconstruction of the Constitution, and its competency to administer entire justice for the whole Union, as well as for its several parts, were the topic of discussion. But this is not the time or the place for such a discussion. *Ad constitutam diem tempusque non venitur.*"

given, the pendency of an action therein would not be a sufficient plea in abatement.<sup>1</sup>

§ 988 d. Whether the pendency of an action in a foreign tribunal of competent jurisdiction is a sufficient bar to another action in the country between the same parties and for the same cause, does not seem to be quite settled, but the weight of authority is against such a rule.<sup>2</sup> If the parties are reversed in the foreign action it would seem to be clear that the pendency of a foreign suit is no cause of abatement to the other, although both relate to the same cause.<sup>3</sup> The courts in the different States in this country are considered as foreign tribunals in this respect, so that the pendency of an action in one State is no good cause of abatement to an action in another,<sup>4</sup> unless in the case of a foreign attachment or trustee process, operating on property as well as person.<sup>5</sup> But where the second suit is brought in a State court, an action pending in the Circuit Court of the United States for the same district, having ample jurisdiction over property and persons, would not be an action pending in a foreign tribunal, and would, therefore, operate as a good plea in abatement;<sup>6</sup> yet a suit

<sup>1</sup> Smith *v.* The Atlantic M. F. Ins. Co. 2 Foster, R. 21; Sperry's case, 5 Co. R. 62 a; Bissell *v.* Briggs, 9 Mass. R. 462; Hall *v.* Williams, 6 Pick. R. 232; Monroe *v.* Douglas, 4 Sandf. Ch. R. 126.

<sup>2</sup> Story, Conflict of Laws, 4th ed. § 610 a; Bowne *v.* Joy, 9 Johns. R. 221; Walsh *v.* Durkin, 12 Johns. R. 99; Bayley *v.* Edwards, 3 Swanst. R. 703; Maule *v.* Murray, 7 T. R. 470; Newell *v.* Newton, 10 Pick. R. 470; Ostell *v.* Lepage, 10 Eng. Law & Eq. R. 250; McJilton *v.* Love, 13 Ill. R. 486; Russel *v.* Field, Stuart, Canada, R. 558; West *v.* McConnell, 5 Miller, Louis. R. 244; Colt *v.* Partridge, 7 Metcalf, R. 570. But see contra, Ex parte Balch, 3 McLean, R. 221; Hart *v.* Granger, 1 Conn. R. 154; Ralph *v.* Brown, 3 Watts & Serg. R. 399.

<sup>3</sup> Wadleigh *v.* Veazie, 3 Sumner, R. 165; Colt *v.* Partridge, 7 Metcalf, R. 570; Haskins *v.* Lombard, 16 Maine R. 140; ante, p. 594, note 1.

<sup>4</sup> Bowne *v.* Joy, 9 Johns. R. 221; Goix *v.* Low, 1 Johns. Cas. 345, and cases cited above. See, also, Dorsey *v.* Maury, 10 Smedes & Marsh. R. 298.

<sup>5</sup> Embree *v.* Hanna, 5 Johns. R. 101; Wheeler *v.* Raymond, 8 Cowen, R. 311; Bowne *v.* Joy, 9 Johns. R. 221.

<sup>6</sup> Smith *v.* The Atlantic M. F. Ins. Co. 2 Foster, R. 21. In this case the

pending in the circuit court for another district would not be a good plea in abatement of a suit in a State court.<sup>1</sup>

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question was, whether the Circuit Court for the District of New Hampshire was a foreign court governed by the State court of New Hampshire, and it was held not to be. Perley, J., said: "The ground is taken for the plaintiff that, as to the courts and government of New Hampshire, the Circuit Court of the United States for this district is to be regarded as a court of foreign jurisdiction; and for that reason an action pending in the circuit court of this district cannot be pleaded in abatement of a subsequent suit brought for the same cause in a court of this State.

"The judiciary of the United States is a branch of the general government of this country, established by the constitution. The Circuit Court of the United States, within its territorial limit, and as to causes within its jurisdiction, cannot be regarded as a foreign court. Its powers are not derived from any foreign government; its judgments operate directly to bind persons and property within this State; its process, mesne and final, is effectual to enforce its own orders and judgments. The circuit court of another district has no authority within this State, and may be considered, territorially and for some purposes, as a foreign jurisdiction.

"The circuit court, and the courts of this State, derive their powers from different sources, and for most, if not for all purposes, are independent of each other. But in certain cases they exercise concurrent jurisdiction. The case, supposed by the plea in this action, is one of them. The plaintiff had his election to pursue his remedy in the courts of this State, or resort to the concurrent jurisdiction of the circuit court.

"The general rule of law forbids that a defendant should be harassed by two suits for the same cause at the same time. In some cases, where the first suit, from defect of jurisdiction in the court, cannot give adequate remedy, a second action is allowed.

"This case falls clearly within the reason of the general rule, which prohibits the second suit. No ground has been suggested, and none occurs to us, for supposing that two suits, one in a State court, and the other in the circuit court for the same State, are less vexatious and oppressive to the defendants, than two suits in the same court.

"On the other hand, the plaintiff fails to bring himself within the reason of the excepted cases, where a second action is allowed, because the court in which the first was pending, cannot give complete remedy for want of jurisdiction over the person or property of the defendants.

"Where the prior suit is in an inferior court of special and limited jurisdiction, incapable of affording the plaintiff the remedy which he needs, the prior

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<sup>1</sup> *Walsh v. Durkin*, 12 Johns. R. 99.

§ 988 e. One exception to the rule that the parties to both actions should be the same, in order to render the one a good plea in abatement to the other, is admitted in the case of *qui tam* actions and informations, and to indictments to recover forfeitures on penal statutes, in which a pending action by one informer, is a sufficient bar to an action by another for the same cause.<sup>1</sup> So, also, where a person may be prosecuted by

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will not abate the second, though both courts exercise their jurisdiction in the same country. Sparry's case, 5 Coke, R. 62 a.

"But the fact that the court, in which the prior action is pending, is a subordinate jurisdiction, would seem to be no objection to the plea, provided the first action can give adequate and complete remedy. It has been decided in numerous cases that an action pending in a court whose jurisdiction is *territorially* foreign, cannot be pleaded in abatement. The reason of this rule would seem to be, not that the authority of the foreign court is questionable within the limits of its jurisdiction, but because the foreign court cannot enforce its orders and judgment beyond its own territory; and, on this account, the remedy of the plaintiff by his prior suit may be incomplete. The defendant may have property which ought to be applied to the payment of the same demand in both jurisdictions; or his property may be in one jurisdiction and his person in another; and suits for these and other reasons may be necessary in both *territorial* jurisdictions. It has accordingly been held, that a suit pending in the circuit court for another district cannot be pleaded in abatement of a suit in a State court. Walsh *v.* Durkin, 12 Johns. R. 99.

"But in this case the plaintiff's remedy was as complete and effectual in the circuit court, as he could have in the courts of this State. The mesne process of that court gives security on the person and property of the defendant, at least, as effectual as can be had by ours; the trial, if held, would be by jurors of this State; the judgment for the plaintiff would be final and conclusive, and could be executed by the process of that court throughout the State. The plaintiff, therefore, had no more necessity or excuse for his second suit, than he would have had if both had been in the same court. And it has accordingly been held that the judgment of the circuit court for the same State is not to be considered in the State courts as a foreign judgment. Barney *v.* Patterson, 6 Har. & Johns. R. 203.

"We are of opinion, that the pendency of another action for the same cause, between the same parties, in the Circuit Court of the United States, is sufficient if well pleaded, to abate a suit in the courts of this State, where the circuit court had jurisdiction of the prior cause."

<sup>1</sup> Commonwealth *v.* Churchill, 5 Mass. R. 174.

indictment or an information *qui tam*, if one prosecution is commenced, it is a bar to the other.<sup>1</sup>

FORMER JUDGMENT OR VERDICT.

§ 989. In the next place, as to a *Former Judgment or Verdict*. A judgment may always be pleaded in bar of a subsequent suit upon the identical cause of action, although the form of the two actions be different.<sup>2</sup> But if a defendant suffer default in an action for several debts, and the plaintiff subsequently bring an action for debts, which might have been proved in the former action, the judgment will create no bar, if he can show that no evidence was given in respect of the debts forming the second cause of action.<sup>3</sup> Yet if he offer evidence on

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<sup>1</sup> Commonwealth *v.* Cheney, 6 Mass. R. 348, per Parsons, C. J.

<sup>2</sup> King *v.* Hoare, 13 Mees. & Welsb. R. 494–504; Todd *v.* Stewart, 9 Q. B. R. 759; s. c. Ibid. 767; Siddall *v.* Rawcliffe, 1 Cr. & M. R. 487; Rice *v.* King, 7 Johns. R. 20; Johnson *v.* Smith, 8 Ibid. 383; Livermore *v.* Herschell, 3 Pick. R. 33; Cist *v.* Zeigler, 16 Serg. & Rawle, R. 282; Hitchin *v.* Campbell, 2 W. Black. R. 827. In the Duchess of Kingston's case, 20 How. St. Trials, 538, which is the leading case on this subject, Lord Chief Justice De Gray said: “From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment.” See, also, Harvey *v.* Richards, 2 Gall. R. 229; Hibshman *v.* Dulleban, 4 Watts, R. 191; Wright *v.* Deklyne, 1 Peters, C. C. R. 202; Gardner *v.* Buckbee, 3 Cowen, R. 120; Bouchaud *v.* Dias, 3 Denio, R. 238; Dame *v.* Wingate, 12 N. Hamp. R. 291; Agnew *v.* McElroy, 10 Smedes & Marsh. R. 552.

<sup>3</sup> Lord Bagot *v.* Williams, 3 B. & C. R. 235; s. c. 5 D. & R. R. 87; Spooner *v.* Davis, 7 Pick. R. 147; Seddon *v.* Tutop, 6 T. R. 607; Hadley *v.* Green, 2 C. & J. R. 374. But see Parkhurst *v.* Sumner, 23 Verm. R. 538.

all his causes of action, and fail in some, the judgment is conclusive with regard to all.<sup>1</sup> The question of the identity of the two causes of action must be determined by the *record*; and if that state a particular cause of action as the foundation of the first suit, parol proof is not admissible to show that a different subject was in fact litigated.<sup>2</sup>

§ 989 a. Where, in an action upon a joint contract, judgment has been obtained against one of the parties, it may be shown in bar of a second suit against the other or both.<sup>3</sup> But where a judgment against one party has been obtained upon a contract which is several as well as joint, it is not a bar to a subsequent action against all parties. Nor is a judgment against all a bar to an action against one, for the obligee has by the form of the contract a right to proceed both jointly and severally against the parties, and in a legal sense, the former judgment was not between the same parties, nor upon the same contract.<sup>4</sup> A judgment with satisfaction would, however, be a complete bar.<sup>5</sup>

§ 989 b. A judgment only operates as a bar where the point at issue has been determined; and if the suit be discontinued, or the plaintiff be nonsuited, it will not be conclusive.<sup>6</sup> So, the cause of action in the second suit must have been *directly* and necessarily involved in the first suit, or that judgment will

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<sup>1</sup> Stafford *v.* Clark, 2 Bing. R. 377; s. c. 9 Moore, R. 738.

<sup>2</sup> Campbell *v.* Butts, 3 Comst. R. 173.

<sup>3</sup> Ward *v.* Johnson, 13 Mass. R. 148; King *v.* Hoare, 13 M. & W. R. 494; Lechmere *v.* Fletcher, 1 Cr. & Mees. R. 623.

<sup>4</sup> The United States *v.* Cushman, 2 Sumner, R. 426; Sheehy *v.* Mandeville, 6 Cranch, R. 253, 265; Dyke *v.* Mercer, 2 Shower, R. 395; Higgens's case, 6 Co. R. 45; Lechmere *v.* Fletcher, 1 Cromp. & Mees. R. 623; King *v.* Hoare, 13 M. & W. R. 494.

<sup>5</sup> Ibid.

<sup>6</sup> Knox *v.* Waldborough, 5 Greenl. R. 185; Hull *v.* Blake, 13 Mass. R. 155; Agnew *v.* McElroy, 10 Sm. & M. R. 552; Johnson *v.* White, 13 Ibid. 584; 1 Greenleaf on Evid. § 530; Bridge *v.* Sumner, 1 Pick. R. 371.

be no bar.<sup>1</sup> So, also, the judgment must have been *on the merits*; and if it be on a technical defect of pleading,<sup>2</sup> or because the court had not jurisdiction,<sup>3</sup> or because of the temporary disability of the plaintiff to sue,<sup>4</sup> or because the debt was not yet due,<sup>5</sup> or on any similar ground, the judgment will not operate as a bar. The same rule applies where the judgment has been reversed.<sup>6</sup> So, also, the judgment must have been in respect to the same property or transaction, and if this be doubtful, parol evidence may be introduced to prove it.<sup>7</sup> But the question in such a case is for the jury to decide.<sup>8</sup> If the judgment be in respect of the same property, it may sometimes be a bar, although between other parties; as where a consignor and consignee bring separate actions against a carrier, a judgment for the carrier in one suit may be a defence in the other.<sup>9</sup>

§ 990. What effect should be given to a foreign judgment is a question which has been much discussed and cannot be said to be entirely free from doubt, but the doctrine that generally obtains in the United States is, that a foreign judgment is only to be received as *prima facie* evidence of the debt, and may be impeached for irregularity, fraud,<sup>10</sup> mis-

<sup>1</sup> King *v.* Chase, 15 N. Hamp. R. 9; Harding *v.* Hale, 2 Gray, R. 399.

<sup>2</sup> Hughes *v.* Blake, 1 Mason, R. 515; McDonald *v.* Rainor, 8 Johns. R. 442; Lampen *v.* Kedgewin, 1 Mod. R. 207.

<sup>3</sup> Estill *v.* Taul, 2 Yerg. R. 467; 1 Greenleaf on Evid. § 530.

<sup>4</sup> Dixon *v.* Sinclair, 4 Verm. R. 354.

<sup>5</sup> New England Bank *v.* Lewis, 8 Pick. R. 113.

<sup>6</sup> Wood *v.* Jackson, 8 Wend. R. 9.

<sup>7</sup> 1 Greenleaf on Evid. § 532; Seddon *v.* Tutop, 6 T. R. 608; Bridge *v.* Gray, 14 Pick. R. 55; Thorpe *v.* Cooper, 5 Bing. R. 116; Phillips *v.* Berrick, 16 Johns. R. 136; Arnold *v.* Arnold, 17 Pick. R. 13; Young *v.* Black, 7 Cranch, R. 565; Henderson *v.* Kenner, 1 Richardson, R. 474.

<sup>8</sup> Ibid.

<sup>9</sup> See Green *v.* Clark, 5 Denio, R. 497; King *v.* Chase, 15 New Hamp. R. 9.

<sup>10</sup> Duchess of Kingston's Case, 20 Howell, State Trials, 355, and Ibid. 538; Bradstreet *v.* Neptune Ins. Co. 3 Sumner, R. 600; Magoun *v.* The New Eng-

take,<sup>1</sup> or want of jurisdiction in the court,<sup>2</sup> or want of proper notice to the parties.<sup>3</sup> For although, by the constitution of the United States, full faith and credit is guaranteed to the public records of every other State,<sup>4</sup> and although, by act of Congress, the judgments given in one State are to have the same credit and faith in all others,<sup>5</sup> yet this only gives them the force

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Ins. Co. 1 Story, R. 157; Wood *v.* Walkinson, 17 Conn. R. 59; Welch *v.* Sykes, 3 Gilman, R. 197.

<sup>1</sup> Agnew *v.* McIlroy, 10 Smedes & Marsh. R. 522; Johnson *v.* White, 13 Smedes & Marsh. R. 584; Dixon *v.* Sinclair, 4 Verm. R. 354; N. Bank *v.* Lewis, 8 Pick. R. 113; McDonald *v.* Rainer, 8 Johns. R. 442; Knox *v.* Waldoborough, 5 Greenl. R. 185.

<sup>2</sup> In Rose *v.* Himely, 4 Cranch, R. 269, 270, Mr. Chief Justice Marshall says: "Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."

"Passing from principle to authority, we find, that in the courts of England, whose decisions are particularly mentioned, because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation that it has in the given case, jurisdiction of the subject-matter." See, also, Bissell *v.* Briggs, 9 Mass. R. 462; Hall *v.* Williams, 6 Pick. R. 232; Munroe *v.* Douglas, 4 Sandford, Ch. R. 126; Gleason *v.* Dodd, 4 Metcalf, R. 333; Borden *v.* Fitch, 15 Johns. R. 121; Noyes *v.* Butler, 6 Barb. S. C. R. 613. See, also, Story on Conflict of Laws, § 608, and cases cited; 2 Kent, Comm. Lect. 27, p. 121, and cases cited in notes.

<sup>3</sup> Sawyer *v.* Maine Fire & Mar. Ins. Co. 12 Mass. R. 291; Story, Conflict of Laws, § 592, cases cited note a, supra; Ewer *v.* Coffin, 1 Cush. R. 23; Arndt *v.* Arndt, 15 Ohio R. 33; McVicker *v.* Beedney, 31 Maine R. 316.

<sup>4</sup> Constitution, art. 354.

<sup>5</sup> Act of Congress, 25th May, 1790, ch. 11.

of domestic judgments, which may be impeached for want of jurisdiction, or for fraud,<sup>1</sup> mistake, and want of notice.

§ 990 a. A distinction is to be taken between judgments *in rem* and judgments *in personam*, and in the former case the rule is that a judgment properly obtained in an action upon a contract in a foreign court of competent jurisdiction, operates as a complete bar to a new suit between the same parties on the same matter.<sup>2</sup> Whatever disposition a foreign court may make of property either movable or fixed within its jurisdiction, or whatever decision it makes as to the right or title thereto, will be binding everywhere. There is, indeed, one exception to this rule which obtains in some of the States of the United States, in respect to the force and effect of foreign sentences in the prize courts of admiralty, determining neutral rights.<sup>3</sup> But the courts of the United States have in such cases followed the general doctrine, and declared them to be binding unless they are impeachable, for want of jurisdiction, or for fraud. Where in proceedings by foreign attachment, garnishment, or trustee process, property is seized to satisfy a debt, and judgment is rendered, it will be conclusive upon the party *in personam* if the court have jurisdiction over him *in personam*, and otherwise it will only be binding *in rem*; and if the goods do not satisfy the debt, the judgment cannot

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<sup>1</sup> Story on Conflict of Laws, § 609.

<sup>2</sup> Rose *v.* Himely, 4 Cranch, R. 241; Story, Conflict of Laws, § 591, § 592; Croudson *v.* Leonard, 4 Cranch, R. 434; The Mary, 9 Cranch, R. 126, 142; Holmes *v.* Remsen, 20 Johns. R. 229; Hull *v.* Blake, 13 Mass. R. 153; McDaniel *v.* Hughes, 3 East, R. 366; Gelston *v.* Hoyt, 3 Wheat. R. 246; Blad *v.* Bamfield, 3 Swanst. R. 604. See 4 Cowen, R. 522, note and cases cited.

<sup>3</sup> Vandenheuvel *v.* United Ins. Co. 2 Johns. Cas. 451. They were declared not to be conclusive by the legislature of Pennsylvania, in March, 1809; and the legislature of Maryland, in 1813, ch. 164, declared them only to be *prima facie* proof. But see Cucullu *v.* Louisiana Ins. Co. 17 Martin, R. 464; Croudson *v.* Leonard, 4 Cranch, R. 434; Bradstreet *v.* Neptune Ins. Co. 3 Sumner, R. 600; Rose *v.* Himely, 4 Cranch, R. 241; Hudson *v.* Guestier, 6 Cranch, R. 281.

be enforced against him *in personam* in another State, out of the jurisdiction of the court.<sup>1</sup> In respect to judgments *in personam*, however, as we have seen, the general rule is that they are only *prima facie* evidence of a debt, but in respect to the force to be given to them, there is some difference of opinion. The weight of authority would seem to support the rule, that unless they can be impeached for want of jurisdiction, fraud, mistake, irregularity, or defect of proper notice, they would be conclusive on the defendant, and that he could not reopen the whole question upon its merits, and plead all the objections to the judgment that he could have made to the original action;<sup>2</sup> and the burden is on the defendant to show that he

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<sup>1</sup> Story on Conflict of Laws, § 549; Ewer *v.* Coffin, 1 Cushing, R. 23; Pawling *v.* Bird's Ex'rs, 13 Johns. R. 192; Robinson *v.* Ex'rs of Ward, 8 Johns. R. 86. In Bissell *v.* Briggs, 9 Mass. R. 468, Mr. Chief Justice Parsons says: "To illustrate this position, it may be remarked that a debtor living in Massachusetts may have goods, effects, or credits, in New Hampshire, where the creditor lives. The creditor there may lawfully attach these, pursuant to the laws of that State, in the hands of the bailiff, factor, trustee, or garnishee, of his debtor; and on recovering judgment, those goods, effects, and credits, may lawfully be applied to satisfy the judgment; and the bailiff, factor, trustee, or garnishee, if sued in this State for those goods, effects, or credits, shall in our courts be protected by that judgment, the court in New Hampshire having jurisdiction of the cause for the purpose of rendering that judgment,—and the bailiff, factor, trustee, or garnishee, producing it, not to obtain execution of it here, but for his own justification. If, however, those goods, effects, and credits, are insufficient to satisfy the judgment, and the creditor should sue an action on that judgment in this State to obtain satisfaction, he must fail, because the defendant was not personally amenable to the jurisdiction of the court rendering the judgment. And if the defendant, after the service of the process of foreign attachment, should either in person have gone into the State of New Hampshire, or constituted an attorney to defend the suit, so as to protect his goods, effects, or credits, from the effect of the attachment, he would not thereby have given the court jurisdiction of his person; since this jurisdiction must result from the service of the foreign attachment. It would be unreasonable to oblige any man living in one State, and having effects in another State, to make himself amenable to the courts of the last State, that he might defend his property there attached." See Middlesex Bank *v.* Butman, 29 Maine R. 19.

<sup>2</sup> This question was fully discussed in the recent English case of Bank of

had no notice of the suit, or no opportunity to appear and defend his interests either personally or by his representative, or that the court had not competent jurisdiction *in personam*, or that the judgment was irregular and improper, or that there was fraud or mistake.<sup>1</sup> Here, however, another distinction is to be observed between suits brought to enforce a foreign judgment and suits to which a foreign judgment is set up as a bar. In respect to the former cases, it has been asserted, that if a judgment is sought to be enforced, its merits may be examined into, but if it be merely pleaded in bar, it should be received as conclusive, unless impugned for the causes before stated.<sup>2</sup> Yet this rule seems to be at variance with the doc-

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Australia *v.* Nias, 20 Law Journ. 294; s. c. 4 Eng. L. & Eq. R. 252, in which the authorities are carefully examined, and the doctrine stated in the text was asserted. See, also, Lewis *v.* Wilder, 4 La. R. 574; and Houlditch *v.* Donegal, 8 Bligh. R. 301, where Lord Brougham clearly holds the same doctrine. See, also, Sinclair *v.* Fraser, Dougl. R. 45, note 1. In Walker *v.* Witter, Dougl. R. 1, Lord Mansfield was of opinion that foreign judgments are examinable, so were Lord Chief Baron Eyre and Mr. Justice Buller, (see Phillips *v.* Hunter, 2 H. Black. R. 410; Galbraith *v.* Neville, cited Dougl. R. 6, note 3. See, also, Hall *v.* Odber, 11 East, R. 118; Bayley *v.* Edwards, 3 Swanst. R. 703). But Lord Nottingham and Lord Hardwicke held that they are conclusive, (see Keanedy *v.* Earl of Cassilis, 2 Swanst. R. 326; Roach *v.* Garvan, 1 Ves. R. 157); and Sir Launcelot Shadwell has recently asserted the same doctrine in Martin *v.* Nicolis, 3 Simons, R. 458. Lord Kenyon and Lord Ellenborough also seem to give the weight of their opinion to the same doctrine. See Galbraith *v.* Neville, Dougl. R. 5; Tarleton *v.* Tarleton, 4 Maule & Selw. R. 21; Guinness *v.* Carroll, 1 Barn. & Adolph. R. 459. In this distressing conflict of opinion in England, it is difficult to lay down a rule. Mr. Justice Story, in his treatise on the Conflict of Laws, gives his opinion in favor of the rule in the text, and it seems generally supported by the American authorities. See the cases cited note 2, p. 603; Story, Conflict of Laws, 608; Starkie on Evidence, Pt. 2, § 62, § 68, p. 214 to 216, and notes by Mr. Metcalf; Cummings *v.* Banks, 2 Barb. R. 602; Middlesex Bank *v.* Butnan, 29 Maine R. 19; Burnham *v.* Webster, 1 Woodb. & Minot, R. 172.

<sup>1</sup> See cases cited above; Sawyer *v.* Marine and Fire Ins. Co. 12 Mass. R. 291; Bradstreet *v.* The Neptune Ins. Co. 3 Sumner, R. 600; Magoun *v.* New Eng. Ins. Co. 1 Story, R. 157.

<sup>2</sup> By Lord Chief Justice Eyre in Phillips *v.* Hunter, 2 H. Black. R. 410;

trine asserted in several late cases, that the plaintiff who has recovered a foreign judgment, may at his option sue the defendant on that judgment, or on the original cause of action, the one not being merged in the other, since in such case the defendant might plead the judgment itself as a bar.<sup>1</sup>

§ 991. A former *verdict or judgment* on the same matter is a conclusive bar to a second action, if it be so pleaded.<sup>2</sup> But if the former verdict be only offered in evidence to the jury, it ordinarily has only the force of evidence, and does not create a bar, or estoppel.<sup>3</sup> This distinction stands upon the ground, that the plaintiff by offering it in evidence, waives its effect as an estoppel. Yet if there were no opportunity to plead it in bar, and it be offered in evidence, the reason for the distinction would fail, and the better opinion would seem to be that it would have the effect of an estoppel, in like manner as if it had been pleaded.<sup>4</sup> The former verdict is conclusive, however,

<sup>2</sup> Kent, Comm. Lect. 37, p. 119, 120; *Sinclair v. Fraser*, cited in the case of the Duchess of Kingston, 11 State Trials, by Harg. 222; *Burrows v. Jeniemo*, 2 Strange, R. 733; *Taylor v. Phelps*, 1 Har. & Gill, R. 492; *Burnham v. Webster*, 1 Woodb. & Minot, R. 174; *Rangeley v. Webster*, 11 N. Hamp. R. 299; *Tarleton v. Tarleton*, 4 Maule & Selw. R. 20.

<sup>1</sup> *Smith v. Nichols*, 5 Bing. N. C. R. 208; *Hall v. Odber*, 11 East, R. 118; *McVicker v. Beedy*, 31 Maine R. 314; *Story, Conflict of Laws*, § 599 *a*. In *Middlesex Bank v. Butman*, 29 Maine R. 19, it is held that a foreign judgment in favor of the plaintiff would not operate as a sufficient bar by way of merger, where the foreign court had no jurisdiction over the *person* of the defendant, and in *Burnham v. Webster*, 1 Woodb. & Minot, R. 171, it was held that a foreign judgment was open to examination to show that certain claims originally in the case were afterwards withdrawn and not passed upon.

<sup>2</sup> *Vin. Ab. tit. Judgment*, Q. 4; *Voight v. Winch*, 2 B. & Ald. R. 662; *Spooner v. Davis*, 7 Pick. R. 147; *Hopkins v. Lee*, 6 Wheat. R. 109; *Tyler v. Hammond*, 11 Pick. R. 193; *Blake v. Clarke*, 6 Greenl. R. 436.

<sup>3</sup> *Howard v. Mitchell*, 14 Mass. R. 241; *Wood v. Jackson*, 8 Wend. R. 9; *Wright v. Butler*, 6 Wend. R. 288.

<sup>4</sup> See 1 Greenleaf on Evid. § 531, and his learned note, in which this rule is maintained. See, also, 2 Smith, Leading Cases, 431, 444, 445; *Killheffer v. Herr*, 17 Serg. & Rawle, R. 325; *Marsh v. Pier*, 4 Rawle, R. 288; *Cist v. Ziegler*, 16 Serg. & Rawle, R. 282; *Estill v. Taul*, 2 Yerg. R. 471; Stafford

only in respect to facts put in issue upon the suit in which that verdict was given, and which were necessary to sustain the verdict. And if the pleadings present different propositions to any of which the judgment may apply, it will operate only as *prima facie* evidence and may be rebutted.<sup>1</sup>

§ 991 *a.* Whether, where an action is brought in *tort* in respect to an article of personal property, the effect of a former judgment in *tort*, operates as a bar, is not in all cases settled. Where in an action of trover for a chattel a judgment in trespass is pleaded, if the title were settled by the previous judgment, it undoubtedly would create a bar.<sup>2</sup> So, also, in an action for money had and received, a previous judgment in trover upon the merits would operate as a bar to a recovery of the money due from a sale of the same goods.<sup>3</sup> But upon the question whether a judgment in trespass, without satisfaction, is a bar to an action in trover against another person for the same goods, there is great difference of opinion. Professor Greenleaf, in his Treatise on Evidence, says, on this point:— “On the one hand it is said, that, by the recovery of judgment in trespass for the full value, the title to the property is vested in the defendant, the judgment being a security for the price; and that the plaintiff cannot take them again, and therefore cannot recover the value of another.<sup>4</sup> On the other

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*v.* Clark, 1 Car. & Payne, R. 405; Lawrence *v.* Hunt, 10 Wend. R. 83, 84; Duchess of Kingston's Case, 20 Howell, State Trials, 538.

<sup>1</sup> Henderson *v.* Kenner, 1 Richardson, R. 474; Seddon *v.* Tutop, 6 T. R. 608; Arnold *v.* Arnold, 17 Pick. R. 4; Hadley *v.* Green, 2 Tyrw. R. 390; Bridge *v.* Gray, 14 Pick. R. 55; Ravee *v.* Farmer, 4 T. R. 146; Thorpe *v.* Cooper, 5 Bing. R. 116; Phillips *v.* Berick, 16 Johns. R. 136. See King *v.* Chase, 15 N. H. R. 9.

<sup>2</sup> Putt *v.* Roster, 2 Mood. R. 318; s. c. 3 Mod. R. 1; Ferrers *v.* Arden, Cro. Eliz. R. 668; 2 Shower, R. 211.

<sup>3</sup> Kitchen *v.* Campbell, 3 Wils. R. 304; s. c. 2 W. Black. R. 827; 1 Greenl. on Evid. § 533. See Agnew *v.* McElroy, 10 Sm. & Mar. R. 552; Buckland *v.* Johnson, 26 Eng. Law & Eq. R. 328.

<sup>4</sup> Broome *v.* Wooton, Yelv. R. 67; Adams *v.* Broughton, 2 Stra. R. 1078;

hand, it is argued, that the rule of *transit in rem judicatam*, extends no farther than to bar another action for the same cause against the same party;<sup>1</sup> that, on principle, the original judgment can imply nothing more than a promise by the defendant to pay the amount, and an agreement by the plaintiff, that, upon payment of the money by the defendant, the chattel shall be his own; and that it is contrary to justice and the analogies of the law, to deprive a man of his property without satisfaction, unless by his express consent. *Solutio pretii emptionis loco habetur*. The weight of authority seems in favor of the latter opinion.”<sup>2</sup>

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Andrews, 18, S. C. R.; White *v.* Philbrick, 5 Greenl. R. 147; Rogers *v.* Moore, 1 Rice, R. 60. And see Buckland *v.* Johnson, 26 Eng. Law & Eq. R. 331, and Bennett's note.

<sup>1</sup> Drake *v.* Mitchell, 3 East, R. 258; Campbell *v.* Phelps, 1 Pick. R. 70, per Wilde, J.

<sup>2</sup> I am happy in this, as on many other points, to avail myself of the very able work of Professor Greenleaf on Evidence, which in acuteness of analysis, clearness of statement, great discrimination and learning, is not surpassed by any treatise on Jurisprudence, and is a model of what a legal work should be. His note on this point is as follows:— “Putt *v.* Rawstern, 3 Mod. R. 1; Jenk. Cent. p. 189; 1 Shep. Touchst. 227; More *v.* Watts, 12 Mod. R. 428; 1 Lord Raym. R. 614, s. c.; Luttrell *v.* Reynell, 1 Mod. R. 282; Bro. Abr. tit. *Judgm.* pl. 98; Morton's case, Cro. El. R. 30; Cock *v.* Jennor, Hob. R. 66; Livingston *v.* Bishop, 1 Johns. R. 290; Rawson *v.* Turner, 4 Johns. R. 467; 2 Kent, Comm. 388; Curtis *v.* Groat, 6 Johns. R. 168; Corbett et al. *v.* Barnes, W. Jones, R. 377; Cro. Car. R. 443; 7 Vin. Abr. 341, pl. 10, s. c.; Barb. *v.* Fish, 5 West. Law Journ. R. 278. The foregoing authorities are cited as establishing principles in opposition to the doctrine of Broome *v.* Wooton. The following cases are direct adjudications to the contrary of that case. Sanderson *v.* Caldwell, 2 Aikens, R. 195; Osterhout *v.* Roberts, 8 Cowen, R. 43; Elliot *v.* Porter, 5 Dana, R. 299; [Blann *v.* Crocheron, 20 Ala. R. 320; Williams *v.* Oley, 8 Humph. R. 563.] See, also, Campbell *v.* Phelps, 1 Pick. R. 70, per Wilde, J.; Claxton *v.* Swift, 2 Show. R. 441, 494; Jones *v.* McNeil, 2 Bail. R. 466; Cooper *v.* Shepherd, 3 M. G. & S. R. 266. The just deduction from all the authorities, as well as the right conclusion upon principle, seems to be this; that the judgment in trespass or trover will not transfer the title of the goods to the defendant, although it is pleadable in bar of any action afterwards brought by the same plaintiff, or

those in privity with him, against the same defendant or those in privity with him. See 3 Am. Law Mag. p. 49-57. And as to the original parties, it seems a just rule, applicable to all personal actions, that wherever two or more are liable *jointly* and *not severally*, a judgment against one, though without satisfaction, is a bar to another action against any of the others for the same cause; but it is not a bar to an action against a stranger. As far as an action in the form of tort can be said to be exclusively joint in its nature, this rule may govern it; but no further. This doctrine, as applicable to joint contracts, has been recently discussed in England, in the case of King *v.* Hoare, 13 M. & W. R. 494, in which it was held that the judgment against one alone was a bar to a subsequent action against the other." See ante, Joint and Several Contracts.

## CHAPTER VIII.

## RELEASE.

§ 992. In the next place, as to the force and effect of a *Release*. A release may be made either by the express agreement of the parties, or may take effect by mere operation of law. A parol contract may be released by a parol release, before breach thereof.<sup>1</sup> But a contract under seal can generally be released only by an instrument under seal.<sup>2</sup> Yet if a parol release be founded upon a sufficient executed consideration, it will be a good defence to an action on a debt by specialty or record.<sup>3</sup> And a judgment may always be discharged by a release under seal.<sup>4</sup>

§ 993. No particular form of words is necessary to constitute a release. An acknowledgment of satisfaction, or a

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<sup>1</sup> See Com. Dig. Assumpsit, G.; Keating *v.* Price, 1 Johns. Cas. 22; Frost *v.* Everett, 5 Cow. R. 497; Frankling *v.* Long, 7 Gill & Johns. R. 407; Goss *v.* Lord Nugent, 5 B. & Ad. R. 66.

<sup>2</sup> Brooks *v.* Stuart, 1 P. & Dav. R. 615; Bond *v.* Jackson, Cooke, R. 500; Littler *v.* Holland, T. R. 590; Peytoe's case, 9 Co. R. 77 b; 1 Phil. Evid. 4th Am. ed. 563, 564; and Cowen and Hill's notes, pt. 2, p. 1479-1483.

<sup>3</sup> Whitehill *v.* Wilson, 3 Penn. R. 405; Wentz *v.* Dehaven, 1 Serg. & Rawle, R. 312; Farley *v.* Thompson, 15 Mass. R. 18; Dearborn *v.* Cross, 7 Cow. R. 48; Munroe *v.* Perkins, 9 Pick. R. 298; Fleming *v.* Gilbert, 3 Johns. R. 558; Lattimore *v.* Harsen, 14 Johns. R. 330; Lefevre *v.* Lefevre, 4 Serg. & Rawle, R. 241; Merrill *v.* Ithaca & Oswego Railroad, 16 Wend. R. 586.

<sup>4</sup> Barker *v.* St. Quintin, 12 Mees. & Welsb. R. 441.

covenant *never* to sue, or not to sue without limitation of time, or any form indicating a manifest intention on the part of the debtor to release the creditor, is sufficient.<sup>1</sup> A covenant not to sue for a limited time will not operate to suspend an action during such time, the debtor's remedy being on the covenant, in case it is broken.<sup>2</sup>

§ 994. A release may be given of part of a debt.<sup>3</sup> Generally, a release of the principal of a debt will also be a release of the interest thereupon; unless the interest be due under a collateral agreement.<sup>4</sup> So a release may be given of a right now existing and established, although it may not come into effect and operation until a future day; but a bare possibility of a right or claim is said not to be the subject of a release.<sup>5</sup> A release, however, will be construed, like all other instruments, according to the intent of the parties, as it can be gathered from the circumstances of the transaction, and the terms of the release.<sup>6</sup> And general words will be limited

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<sup>1</sup> Bacon, Abr. Release, A.; Com. Dig. Release, A. 1; Rosevelt *v.* Stackhouse, 1 Cow. R. 122; Cuyler *v.* Cuyler, 2 Johns. R. 186; White *v.* Dingley, 4 Mass. R. 433; Shed *v.* Pierce, 17 Mass. R. 623; Deland *v.* Amesbury, W. & C. Manuf. Co. 7 Pick. R. 244; Clark *v.* Russel, 3 Watts, R. 213; Foster *v.* Purdy, 5 Metcalf, R. 442.

<sup>2</sup> Thimbleby *v.* Barron, 3 M. & W. R. 210; Perkins *v.* Gilman, 8 Pick. R. 229; Ford *v.* Beech, 11 Q. B. R. 852; Webb *v.* Spicer, 13 Q. B. R. 886; Moss *v.* Hall, 5 Excheq. R. 46; Fullam *v.* Valentine, 11 Pick. R. 159; Wi-nans *v.* Huston, 6 Wend. R. 471; Foster *v.* Purdy, 5 Metcalf, R. 442; Berry *v.* Bates, 2 Blackf. R. 118; Guard *v.* Whiteside, 13 Illinois R. 7.

<sup>3</sup> 2 Roll. Abr. 413, tit. Release, H. pt. 1.

<sup>4</sup> Harding *v.* Ambler, 3 Mees. & W. R. 279; Veazie *v.* Williams, 3 Story, R. 54, 612.

<sup>5</sup> Pierce *v.* Parker, 4 Metcalf, R. 80.

<sup>6</sup> Morley *v.* Frear, 4 M. & P. R. 315; s. c. 6 Bing. R. 547; Solly *v.* Forbes, 4 Moore, R. 448. As to the construction of a lease see *ante*, § 643, and see Rich *v.* Lord, 18 Pick. R. 325. In this case Mr. Chief Justice Shaw said: "It is now a general rule in construing releases, especially where the same instrument is to be executed by various persons, standing in various relations, and having various kinds of claims and demands against the releasee, that general words though the most broad and comprehensive, are to be limited to particu-

and qualified by particular recitals and specifications of claims released.<sup>1</sup>

§ 994 a. Whether the contract be under seal<sup>2</sup> or merely by parol,<sup>3</sup> it may be discharged by parol, before breach. But after breach it must be by a release under seal, unless it operate as an accord and satisfaction.<sup>4</sup> Bills of exchange and promissory

lar demands, where it manifestly appears, by the consideration, by the recital, by the nature and circumstances of the several demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties. And for the purpose of ascertaining that intent, every part of the instrument is to be considered.

" As where general words of release are immediately connected with a proviso, restraining their operation. *Solly v. Forbes*, 2 Brod. & Bing. R. 38. So a release of all demands, then existing, or which should thereafter arise, was held not to extend to a particular bond, which was considered not to be within the recital and consideration of the assignment and not within the intent of the parties. *Payler v. Homersham*, 4 Maule & Selw. R. 423. So, where it is recited, that various controversies are subsisting between the parties, and actions pending, and that it had been agreed, that one should pay the other a certain sum of money, and that they should mutually release all actions and causes of action, and thereupon such releases were executed, it was held, that though general in terms, the releases were qualified by the recital and limited to actions pending; *Simons v. Johnson*, 3 Barn. & Adolph. R. 175; *Jackson v. Stackhouse*, 1 Cowen, R. 126. So it has been held in Massachusetts, that where upon the receipt of a proportionate share of a legacy given to another, the person executed a release of all demands under the will, it would not apply to another and distinct legacy to the person himself. *Lyman v. Clark*, 9 Mass. R. 235.

<sup>1</sup> *Lyman v. Clark*, 9 Mass. R. 235; *Rich v. Lord*, 18 Pick. R. 325; *McIntyre v. Williamson*, 1 Edw. Ch. R. 34; *Payley v. Homersham*, 4 M. & S. R. 426; *Jackson v. Stackhouse*, 1 Cowen, R. 126; *Dunbar v. Dunbar*, Sup. Jud. Ct. Mass. Bristol, Oct. T. 1855.

<sup>2</sup> *Wentz v. Dehaven*, 1 Serg. & Rawle, R. 312; *Whitehill v. Wilson*, 3 Penn. R. 405; *Shaw v. Pratt*, 22 Pick. R. 308; *Dearborn v. Cross*, 7 Cowen, R. 48; *Delacroix v. Bulkley*, 13 Wend. R. 71.

<sup>3</sup> *Goss v. Lord Nugent*, 5 Barn. & Adolph. R. 58. Per Lord Abinger, Adams v. Wardley, 1 Mees. & Welsb. R. 374; *King v. Gillett*, 7 Mees. & Welsb. R. 55; *Langdon v. Stokes*, Cro. Car. 383; *Edward v. Weeks*, 1 Modern R. 262. See *Chitty on Contracts*, p. 674, and cases cited p. 790, ninth Am. ed.

<sup>4</sup> *Foster v. Dawber*, 6 Excheq. R. 839, 851; *Bender v. Sampson*, 11 Mass.

notes are known exceptions to this rule, and may be discharged by parol at any time.<sup>1</sup>

§ 995. A release given by one of several creditors, each having an entire control over the whole debt, as in the case of an executor or partner, discharges the debtor from all liability to other creditors upon the debt, in respect of which the release is given.<sup>2</sup> But if the creditors have a several interest, a release by one will not discharge the liability of the debtor to the other.<sup>3</sup> So, also, if a trustee, or nominal plaintiff, fraudulently release the action, to the injury of his beneficiary, the court will set aside the release,<sup>4</sup> upon distinct proof of fraud.<sup>5</sup>

§ 996. In like manner, a release under seal, if given to one of several debtors, jointly liable, enures to the benefit of all; even though it should appear that the release was given at the express instance of the other debtors, who thereupon agreed to remain liable;<sup>6</sup> for it is a technical rule of law that an instrument, under seal, cannot be varied by parol averment.<sup>7</sup> But a covenant not to sue one of several joint and several

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R. 42; *Rosevelt v. Stackhouse*, 1 Cowen, R. 122; *Crawford v. Millspaugh*, 13 Johns. R. 87.

<sup>1</sup> *Foster v. Dawber*, 6 Excheq. R. 839.

<sup>2</sup> *Barker v. Richardson*, 1 Younge & Jerv. R. 362; *Bacon, Abr. Release*, E.; *Murray v. Blatchford*, 1 Wend. R. 583; *Decker v. Livingston*, 15 Johns. R. 479; *Austin v. Hall*, 13 Johns. R. 286; *Halsey v. Whitney*, 4 Mason, R. 206; 3 Kent, Comm. 47, 48; *Napier v. McLeod*, 9 Wend. R. 120.

<sup>3</sup> *Bacon, Abr. Release*, E.; *Barker v. Richardson*, 1 Younge & Jerv. R. 362.

<sup>4</sup> *Manning v. Cox*, 7 Moore, R. 617; *Crook v. Stephen*, 5 Bing. N. C. R. 688; s. c. 7 Scott, R. 848; *Legh v. Legh*, 1 B. & P. R. 447; *Innell v. Newman*, 4 B. & Ald. R. 419; *Herbert v. Piggott*, 2 Dowl. P. C. R. 393.

<sup>5</sup> *Jones v. Herbert*, 7 Taunt. R. 421. In Massachusetts the question of fraud must be tried by a jury. *Eastman v. Wright*, 6 Pick. R. 316; *Loring v. Brackett*, 3 Pick. R. 403.

<sup>6</sup> See ante, § 33 k, and cases cited.

<sup>7</sup> *Brooks v. Stuart*, 9 Adolph. & Ell. R. 854; *Cocks v. Nash*, 9 Bing. R. 345; but see ante, § 33 k, and note 2.

debtors would not operate to release the others.<sup>1</sup> So a release by parol to one debtor, will not operate as a discharge to other debtors jointly liable, and can only be pleaded by the debtor to whom it was given.<sup>2</sup>

§ 997. Indeed, a parol release to one of several joint obligors will never operate as a complete discharge of the others, unless the debt be fully satisfied by him. If it be partially satisfied, it may, *pro tanto*, be pleaded in discharge by the others.<sup>3</sup> But if a release be given, under seal, to one of two joint obligors, with a parol agreement by the party not released, that he should remain liable, it is a discharge of both parties; because the parol agreement cannot avoid the legal effect of the release under seal.<sup>4</sup> But although a release under seal cannot be qualified by extrinsic evidence, varying its terms,<sup>5</sup> yet parol evidence as to incidental matters beyond the release, and forming a part of the consideration therefor, is admissible. Thus, in an agreement under seal, compromising a suit, a parol undertaking, that one of the parties shall pay his costs, may be shown.<sup>6</sup>

§ 997 a. A release must ordinarily be given by the person having a legal interest; and a release by a person only bene-

<sup>1</sup> Tuckerman *v.* Newhall, 17 Mass. R. 583; Hutton *v.* Eyre, 6 Taunt. R. 289; Lacy *v.* Kynaston, 12 Mod. R. 548; Ward *v.* Johnson, 6 Munf. R. 6. See ante, Joint and Several Contracts, 33 *k*, 33 *l*.

<sup>2</sup> Shaw *v.* Pratt, 22 Pick. R. 308; Pond *v.* Williams, 1 Gray, R. 630; Walker *v.* McCulloch, 4 Greenl. R. 421; Harrison *v.* Close, 2 Johns. R. 448; Rowley *v.* Stoddard, 7 Johns. R. 209. But the rule is different in England. Nicholson *v.* Revill, 4 Adolph. & Ell. R. 675.

<sup>3</sup> See Shaw *v.* Pratt, 22 Pick. R. 308, and cases cited in the previous note.

<sup>4</sup> Cocks *v.* Nash, 4 Moore & Scott, R. 162; s. c. 9 Bing. R. 341; Brooks *v.* Stuart, 1 Per. & D. R. 615.

<sup>5</sup> Baker *v.* Dewey, 1 Barn. & Cres. R. 704; Brooks *v.* Stuart, 4 Adolph. & Ell. R. 854.

<sup>6</sup> Morancy *v.* Quarles, 1 McLean, R. 191. See ante, Receipts, § 981.

ficially interested is not a sufficient bar to an action by the party legally interested.<sup>1</sup> Thus, a release by a husband of a covenant by a third person to pay an annuity to his wife, will not defeat an action by her on the covenant.<sup>2</sup> But a release by a trustee will be set aside, upon proof that it is injurious to the *cestui que trust*, and was made without his knowledge and assent.<sup>3</sup> Where a release is given by one of several co-plaintiffs to a suit, and it appears that he is merely a nominal party, having no interest in the subject-matter, the release will be of no avail.<sup>4</sup> So, also, if it should in such a case appear that the release was given fraudulently, and by collusion between the releasor and the releasee, and operates to the injury of the other parties, it would be set aside.<sup>5</sup>

§ 998. A release may also arise from mere operation of law in several ways. 1. By the assuming of a relation between the parties, inconsistent with the relation of creditor or debtor,—as if the parties marry;<sup>6</sup> or if the debtor make his creditor his executor.<sup>7</sup> But where a bond is given in contemplation of marriage, and payable after the death of the obligor, the marriage would not operate as a release.<sup>8</sup> So, also, a

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<sup>1</sup> *Quick v. Ludborrow*, 3 Bulstrode, R. 29; *Walmesly v. Cooper*, 11 Adolph. & Ell. R. 216.

<sup>2</sup> *Quick v. Ludborrow*, Bulstrode, R. 29.

<sup>3</sup> *Jones v. Herbert*, 7 Taunt. R. 421; *Crook v. Stephen*, 5 Bing. N. C. R. 688; *Eastman v. Wright*, 6 Pick. R. 323; *Herbert v. Pigott*, 2 Cromp. & Mees. R. 384; *Furnival v. Weston*, 7 J. B. Moore, R. 356.

<sup>4</sup> *Rawstorne v. Gandell*, 15 Mees. & Welsb. R. 304.

<sup>5</sup> *Phillips v. Clagett*, 11 Mees. & Welsb. R. 93; *Wild v. Williams*, 6 Mees. & Welsb. R. 490; *Rawstorne v. Gandell*, 15 Mees. & Welsb. R. 304.

<sup>6</sup> Co. Litt. 264, b.; *Allin v. Shadburne*, 1 Dana, R. 69; *Milbourn v. Ewart*, 5 T. R. 381.

<sup>7</sup> Co. Litt. 264, b.; Com. Dig. Release, A. 3; Administration, B. 5; *Freakley v. Fox*, 9 B. & C. R. 130; *Bacon, Abr. Release*, B.; *Cheetham v. Ward*, 1 Bos. & Pul. R. 630.

<sup>8</sup> *Milbourn v. Ewart*, 5 T. R. 381.

mere appointment, by a creditor, of a debtor as administrator, unless he act in such capacity, constitutes no release.<sup>1</sup>

§ 999. 2d. By taking a higher security, as where a bond is substituted in place of a simple contract debt, and has a remedy coëxpressive with the original debt.<sup>2</sup> But if the bond be given merely as collateral security, it will not operate as a release of the prior debt.<sup>3</sup>

§ 1000. 3d. By either party making a material alteration in a specialty or written contract, without the consent of the other party, in which case the contract would be thereby nullified, although the original words should still remain legible.<sup>4</sup> It was formerly held that the same rule would apply to cases where the alteration in the contract was by the obligee or promisor, even though the alteration be of immaterial words.<sup>5</sup> But in England, although the cases are not in complete accordance, the weight of authority would seem to be against this rule, in all cases where the alteration is without fraudu-

<sup>1</sup> *Freakley v. Fox*, 9 Barn. & Cres. R. 130; s. c. 4 Man. & Ry. R. 18; *Winship v. Bass*, 12 Mass. R. 199; *Kinney v. Ensign*, 18 Pick. R. 232; *Hobart v. Stone*, 10 Pick. R. 220; *Pusey v. Clemson*, 9 Serg. & Rawle, R. 208; *Ipswich Man. Co. v. Story*, 5 Met. R. 313.

<sup>2</sup> *Twopenny v. Young*, 3 B. & C. R. 210, 211; s. c. 5 D. & R. R. 262; *Banorhee v. Hovey*, 5 Mass. R. 11; *Ward v. Johnson*, 13 Mass. R. 148; *Jones v. Johnson*, 3 Watts & S. R. 276.

<sup>3</sup> *Charles v. Scott*, 1 Serg. & R. R. 294; *Banorhee v. Hovey*, 5 Mass. R. 11; *Twopenny v. Young*, 3 B. & C. R. 210; *Emes v. Widdowson*, 4 C. & P. R. 151; *Solly v. Forbes*, 2 Brod. & B. R. 38; *United States v. Lyman*, 1 Mason, R. 482; *Drake v. Mitchell*, 3 East, R. 251.

<sup>4</sup> *Pigot's Case*, 11 Co. 26, b; *Markham v. Gonaston*, Cro. Eliz. R. 626; *Master v. Miller*, 4 T. R. 320; s. c. 5 T. R. 367; *Miller v. Stewart*, 4 Wash. C. C. 26; *Mollett v. Wackerbarth*, 5 C. B. Rep. 181; *Martendale v. Follett*, 1 N. Hamp. R. 95.

<sup>5</sup> *Pigot's case*, 11 Coke, R. 26 b, and cases cited in the previous note.

lent intent.<sup>1</sup> In this country, certainly, it is not supported,<sup>2</sup> and the doctrine which obtains here, is that if the alteration be not material, and especially if it be the correction of a patent

<sup>1</sup> In *Hutchins v. Scott*, 2 Mees. & Welsb. R. 809, a lease was made to the plaintiff of a house, No. 38, and the number was altered to 36. Lord Abinger said, "No case has gone the length of saying that, when a deed is altered, and thereby vitiated, it ceases to be evidence; it may be so with reference to the stamp laws:— there is no occasion, however, in the present case, to raise the general question. The old law was, no doubt, much more strict than it has been in modern times. Originally, there could be no such thing as founding upon a deed without making profert of it; and it was but an invention of the pleaders, growing out of a decision of Lord Mansfield's, to allege, as an excuse for not making profert, a loss of the deed by time and accident; founded on the presumption to be derived from long possession and enjoyment. I can hardly see how such a course is consistent with the old authorities which say that any alteration even by a stranger shall vitiate a deed. If it be so altered as to leave no evidence of what it originally was, that may prevent any party from using it; or if it be altered in a material part by a party taking a benefit under it, that may prevent *him* even from showing what it originally was. Here, however, it is sufficient to decide that this agreement was evidence to prove the terms of the holding; and there was no evidence of any other holding than that of the house, No. 35." See also *Swiney v. Barry*, 1 Jones, R. 109; *Falmouth v. Roberts*, 9 Mees. & Welsb. R. 469. In *Master v. Miller*, 4 T. R. 334, 335, the necessity of some fraudulent intent on the part of the promisor was strongly insisted on by Buller, J. See, also, *Henfree v. Bromley*, 6 East, R. 309; *Norton v. Powell*, 4 Man. & Grang. R. 42, and note (a) of the reporters; *Wilkinson v. Johnson*, 3 Barn. & Cress. R. 428; *Raper v. Birkbeck*, 15 East, R. 17. In *Powell v. Divett*, 15 East, R. 29, it was held that an alteration of bought and sold notes by a broker, at the instance of the broker, and without the consent of the vendee, avoided the contract; but the ground on which the court proceeded, was that the alteration was fraudulent, and could not be received in evidence. But see *Davidson v. Cooper*, 11 Mees. & Welsb. R. 778; s. c. 13 Mees. & Welsb. R. 343; and *Mollett v. Wackerbarth*, 5 C. B. R. 181.

<sup>2</sup> *Pequawket Bridge v. Mather*, 8 N. Hamp. R. 139; *Bowers v. Jewell*, 2 N. Hamp. R. 543; *Smith v. Crooker*, 5 Mass. R. 538; *Hunt v. Adams*, 6 Mass. R. 519; *Granite Railway Co. v. Bacon*, 15 Pick. R. 239; *Langdon v. Paul*, 20 Verm. R. 217; *Adams v. Frye*, 3 Metcalf, R. 103; *Thornton v. Appleton*, 29 Maine R. 298; *Smith v. Dunham*, 8 Pick. R. 246; *Hatch v. Hatch*, 9 Mass. R. 311; *Marshall v. Gougle*, 10 Serg. & Rawle, R. 164.

error,<sup>1</sup> or an expression of what would be implied by law,<sup>2</sup> or the addition of words and matters purely a mistake, and by which the manifest meaning and effect of the instrument is not altered,<sup>3</sup> it would not be a sufficient alteration to avoid a contract. So, also, the erasure of an erroneous word or words,

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<sup>1</sup> *Hutchins v. Scott*, 2 Mees. & Welsb. R. 809; *Smith v. Crooker*, 5 Mass. R. 539.

<sup>2</sup> 1 *Greenleaf on Evid.* § 567; *Hunt v. Adams*, 6 Mass. R. 519; *Waugh v. Bussell*, 5 *Taunt. R.* 707; *Paget v. Paget*, 2 *Chanc. R.* 101; *Hale v. Russ*, 1 *Greenl. R.* 334; *Knapp v. Maltbuy*, 13 *Wend. R.* 587; *Brown v. Pinkham*, 18 *Pick. R.* 172.

<sup>3</sup> *Hunt v. Adams*, 6 Mass. R. 519. In *Adams v. Frye*, 3 *Metcalf, R.* 103, the name of a witness to a bond was added, Dewey, J., said, "There was, by the alteration which was made in the case at bar, a material change introduced as to the nature and kind of evidence which might be relied upon to prove the facts necessary to substantiate the plaintiff's case in a court of law. By adding to the bond the name of an attesting witness, the obligee became entitled to show the due execution of the same by proving the handwriting of the supposed attesting witness, if the witness was out of the jurisdiction of the court. It is quite obvious, therefore, that a fraudulent party might, by means of such an alteration of a contract, furnish the legal proof of the due execution thereof, by honest witnesses swearing truly as to the genuineness of the handwriting of the supposed attesting witness; and yet the attestation might be wholly unauthorized and fraudulent. It seems to us, that we ought not to sanction a principle which would permit the holder of an obligation thus to tamper with it with entire impunity. But such would be the necessary consequence of an adjudication that the subsequent addition of the name of an attesting witness, without the privity or consent of the obligee, is not a material alteration of the instrument, and would, under no circumstances, affect its validity.

" But we think that it would be too severe a rule, and one which might operate with great hardship upon an innocent party, to hold inflexibly that such alteration would, in all cases, discharge the obligor from the performance of his contract or obligation. If an alteration like that which was made in the present case, can be shown to have been made honestly, if it can be reasonably accounted for, as done under some misapprehension or mistake, or with the supposed assent of the obligor; it should not operate to avoid the obligation. But on the other hand, if fraudulently done, and with a view to gain any improper advantage, it is right and proper that the fraudulent party should lose wholly the right to enforce his original contract in a court of law."

and the substitution of others, the former still remaining legible, would not render the contract void.<sup>1</sup> But where the alteration is material, or for the benefit of the party making it, and especially when it is fraudulently made, it would annul the contract.<sup>2</sup>

§ 1000 a. Where an alteration is made by a stranger, without the knowledge of either party at the time, it is treated as a mere erasure by accident,<sup>3</sup> and does not vitiate the contract, if the original writing remain legible; and if the contract be so injured that it cannot be read, or can only be read in parts, secondary evidence may be resorted to to prove its terms.<sup>4</sup> So, also, where a seal is torn off, the mutilated deed or bond may be declared upon as the deed of the party, and the special facts set forth in the profert.<sup>5</sup>

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<sup>1</sup> *Hutchins v. Scott*, 2 Mees. & Welsb. R. 809, and cases cited above.

<sup>2</sup> *Master v. Miller*, 4 T. R. 320; *Adams v. Frye*, 3 Metcalf, R. 103; *Marshall v. Gouger*, 10 Serg. & Rawle, 164, and cases cited above.

<sup>3</sup> *Pigot's Case*, 11 Co. 26, b; *Lewis v. Payn*, 8 Cow. R. 71; *Henfree v. Bromley*, 6 East, 309; See *Davidson v. Cooper*, 11 M. & W. R. 778; *Mollett v. Wackerbarth*, 5 Com. B. Rep. 181; *Swincey v. Barry*, 1 Jones, R. 109; *Smith v. McGowan*, 3 Barb. R. 404; *Waring v. Smyth*, 2 Barb. Ch. R. 119; *Nichols v. Johnson*, 10 Conn. R. 192; *Rees v. Overbaugh*, 6 Cowen, R. 746; *Lewis v. Payn*, 8 Cowen, R. 71; *Jackson v. Malin*, 15 Johns. R. 293; *Davis v. Carlisle*, 6 Alab. R. 707; *Medlin v. Platte County*, 8 Missouri R. 235.

<sup>4</sup> *1 Greenl. on Evid.* § 566, cases cited above. See, also, *Henfree v. Bromley*, 6 East, R. 309; *Cutts v. U. S.* 1 Gallis. R. 69; *Rees v. Overbaugh*, 6 Cowen, R. 746. In *U. S. v. Spalding*, 2 Mason, R. 478.

<sup>5</sup> In *U. S. v. Spalding*, 2 Mason, R. 482. Mr. Justice Story says: "The old cases proceeded upon a very narrow ground. It seems to have been held, that a material alteration of a deed by a stranger, without the privity of either obligor or obligee, avoided the deed; and by parity of reasoning the destruction or tearing off the seal either by a stranger or by accident (*Pigot's case*, 11 Co. 27; *S. P. & C. 1 Roll.* R. 39; 1 Roll. Abr. Fait, X, 1, 2, 3; *Perk. R.* § 135, 136; *U. States v. Cutts*, 1 Gallis. R. 69, and cases cited; *Com. Dig. Fait*, (F. 2;) *Mathewson's case*, 5 Co. R. 23; 1 Dyer, R. 59, and note 12, *Shepp. Touch.* 69). A doctrine so repugnant to common sense and justice, which inflicts on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven, ought

§ 1000 b. Where an instrument appears to be altered, the alteration will be presumed to be contemporaneous with its

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to have the unequivocal support of unbroken authority, before a court of law is bound to surrender its judgment to what deserves no better name than a technical quibble. It appears to me to be shaken to its very foundation in modern times; and every case, which upholds a remedy at law, where the deed is lost by time and accident, is decisive against it. The case of *Read v. Brookman*, (3 Term R. 151, and see *Bolton v. Bishop of Carlisle*, 2 H. Bl. 259,) is directly in point, and is reasoned out by Lord Kenyon with vast force and ability, upon principles of eternal justice. Mr. Justice Buller, in *Master v. Miller* (4 T. Rep. 320, 339; and see *Waugh v. Bussell*, 5 Taunt. Rep. 707; *Totty v. Nesbitt*, and *Matison v. Atkinson*, cited 3 Term Rep. 153, note (c); *Henfree v. Bromley*, 6 East, R. 309,) said, and he is a great authority, ‘It is not universally true, that a deed is destroyed by an alteration, or by the tearing off the seal. In *Palmer*, 403, a deed, which had erasures in it, and from which the seal was torn, was held good, it appearing that the seal was torn off by a little boy. So, in any case where the seal is torn off by accident after plea pleaded, as appears by the cases quoted by the plaintiff’s counsel. And in these days, I think, even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration, which would obviate every doubt on that point by stating the truth of the case. The difficulty, which arose in the old cases, depended very much on the technical forms of pleading applicable to deeds alone. The plaintiff made a profert of the deed under seal, which he still must do, unless he can allege a sufficient ground for excusing it. When that is done, the deed or the profert must agree with that stated in the declaration, or the plaintiff fails. But the profert of a deed without a seal will not support an allegation of a deed with a seal.’ There is so much sound sense and legal propriety in this doctrine, that one is persuasively urged to adopt it, and it stands supported by the authority of other cases. But however this may be, it is clear that a divulsion of the seal by the obligor himself, or by his connivance without the assent of obligee, does not avoid the deed. (*Totty v. Nesbitt*, 3 Term R. 153, note (c), *Shepp. Touch.* 69.) And it has been so decided by this court, (*Cutts v. U. S.*, 1 Gallison, R. 69). And I have no hesitation in declaring, that if the seal is torn off with the assent of the obligee, either by mistake or by fraud and imposition practised by the *obligor*, it may still be declared on as a deed, making the proper averment of the facts upon the profert, and the party will be entitled to a recovery. The case of *Matison v. Atkinson*, cited in a note in 3 T. Rep. 153, fully supports this doctrine; and if it were of the first impression, I should not hesitate to adopt it. Dealing with this case, therefore, as I am bound to do according to the admitted facts, I must take it

execution.<sup>1</sup> But if the alteration be against the interest of the party offering it, as if it be a note or bond altered to a less sum, the law does not presume that it was improperly made, so as to throw on him the burden of accounting for it.<sup>2</sup> But where there are any suspicious circumstances, it is for a jury to determine whether the alteration were made after or before the execution of the instrument, or with or without the assent of the other party.<sup>3</sup> But an exception to this rule is admitted in the case of negotiable securities, in regard to which it is held that every alteration must be explained by the party

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to be a case, where the obligors to the bonds have procured the destruction of the seals by the obligee, not merely by a mistake of the facts, but by gross fraud and imposition. (See also *Perrott v. Perrott*, 14 East, R. 423.) We may readily see, how this doctrine stands in equity, from what fell from Lord Hardwicke, in *Skip v. Huey* (3 Atk. 91, 93), whose language meets the present case in its material features. ‘There are many cases,’ says his lordship, ‘where equity will set up debts extinguished at law against a surety, as well as against a principal; as where a bond is burnt or cancelled by accident or mistake, and much stronger, if a principal procure the bond to be delivered up by fraud, in such a case the court would certainly set it up, because he shall not avail himself of the fraud of any of the debtors.’ Now it appears to me clear, that the doctrine is the same at law as in equity in this respect, whenever, from the nature of its proceedings, a court of law can administer relief.” *Powers v. Ware*, 2 Pick. R. 451; *Read v. Brookman*, 3 T. R. 152; *Morrill v. Otis*, 12 N. Hamp. R. 466.

<sup>1</sup> *Trowell v. Castle*, 1 Keb. R. 22; *Bailey v. Taylor*, 11 Conn. R. 531; *Crabtree v. Clark*, 7 Shep. R. 337, and cases cited below. See, also, 1 Greenleaf on Evid. § 564, and cases cited.

<sup>2</sup> *Bailey v. Taylor*, 11 Conn. R. 531; *Coulson v. Walton*, 9 Peters, R. 789.

<sup>3</sup> The rule is so laid down by Professor Greenleaf in his learned treatise on Evidence, vol. 1, § 564. See his note on this subject. See, also, *Gooch v. Bryant*, 1 Shepley, R. 386; *Crabtree v. Clarke*, 7 Shep. R. 337; *Doe v. Catamore*, 5 Eng. Law & Eq. R. 349; *Wickes v. Caulk*, 5 Harr. & Johns. R. 41; *Bailey v. Taylor*, 11 Conn. R. 531; *Wilde v. Armsby*, 6 Cushing, R. 314; *Hemming v. Trener*, 9 Adolph. & Ell. R. 926; *Smith v. Farmer*, 1 Gall. R. 170; *Cumberland Bank v. Hall*, 1 Halst. R. 215; *Barrington v. Bank of Washington*, 14 Serg. & Rawle, R. 405; *Penny v. Corwithe*, 18 Johns. R. 499. See, also, the elaborate judgment in *Beaman v. Russell*, 20 Verm. R. 205, in which the question is ably discussed.

claiming under it.<sup>1</sup> Whether the alteration be a material one is a question of law for the court and not of fact for the jury.<sup>2</sup>

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<sup>1</sup> *Knight v. Clements*, 8 Adolph. & Ell. R. 215; *Clifford v. Parker*, 2 Mann. & Grang. R. 909. *Bishop v. Chambre*, 3 Car. & Payne, R. 55; *Whitfield v. Collingwood*, 1 Car. & Kirw. R. 325; *Cariss v. Tattersall*, 2 Man. & Grang. R. 890; *Taylor v. Mosely*, 6 Car. & Payne, R. 273. And in this country, *Hills v. Barnes*, 11 N. Hamp. R. 395; *Humphreys v. Guillow*, 13 N. Hamp. R. 385; *Simpson v. Stackhouse*, 9 Barr, R. 186; *Davis v. Carlisle*, 6 Alab. R. 707; *McMicken v. Beauchamp*, 2 Miller, Louis. R. 290; *Walters v. Short*, 5 Gilm. R. 252. But see, *contra*, *Davis v. Jenney*, 1 Met. R. 221.

<sup>2</sup> *Steele v. Spencer*, 1 Peters, R. 552; *Stephens v. Graham*, 7 Serg. & Rawle, R. 508; *Bowers v. Jewell*, 2 N. Hamp. R. 543.

## CHAPTER IX.

## TENDER.

§ 1001. In the next place, as to *Tender*. A tender of money, in satisfaction of a debt, if made before the issuing of the writ, is a defence to costs of suit and damages, and interest upon the debt accruing after tender; but it is no defence to the debt itself.<sup>1</sup> It may be made upon a claim for a *quantum meruit*;<sup>2</sup> but not upon a claim for damages upon an unperformed contract;<sup>3</sup> nor in an action on the case; nor where the damages are uncertain.<sup>4</sup>

§ 1002. A tender need not be made by the debtor personally;

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<sup>1</sup> Bac. Abr. Tender; *Waistell v. Atkinson*, 3 Bing. R. 290; s. c. 11 Moore, R. 14; *Law v. Jackson*, 9 Cow. R. 641; *Coit v. Houston*, 3 Johns. Cas. R. 243; *Carley v. Vance*, 17 Mass. R. 389; *Suffolk Bank v. Worcester Bank*, 5 Pick. R. 106; *Fuller v. Pelton*, 16 Ohio R. 457; *Cornell v. Green*, 10 Serg. & R. R. 14; *Briggs v. Calverly*, 8 T. R. 629; *Moffat v. Parsons*, 5 Taunt. R. 307; *Dixon v. Clark*, 5 C. B. R. 365.

<sup>2</sup> *Johnson v. Lancaster*, Str. R. 576; *Cox v. Brain*, 3 Taunt. R. 95.

<sup>3</sup> *Dearle v. Barrett*, 2 Ad. & Ell. R. 82; s. c. 4 Nev. & M. R. 200; 3 Dowl. P. C. R. 13; *Green v. Shurtliff*, 19 Verm. R. 592.

<sup>4</sup> Bacon, Abr. Tender, P. 8, 9, 10, 14, &c.; *Bennett v. Francis*, 2 Bos. & Pul. R. 550; *Dixon v. Clark*, 5 Com. B. R. 365; *Waistell v. Atkinson*, 3 Bing. R. 290; *Law v. Jackson*, 9 Cowen, R. 641; *Coit v. Houston*, 3 Johns. Cas. R. 243; *Raymond v. Bearnard*, 12 Johns. R. 274; *Huntington v. American Bank*, 6 Pick. R. 340. In New York and in Massachusetts, tender is allowed in cases of involuntary trespass. 2 New York Revised Stat. 553, § 20, 22; *Slack v. Brown*, 13 Wend. R. 390; Rev. Stat. Mass. 1836, ch. 105, § 12.

a tender by any person in his behalf being sufficient, if it be subsequently assented to by him.<sup>1</sup> So, also, a tender need not be made to the creditor personally, but it may be made to any authorized agent,<sup>2</sup> or to any person he holds out as competent to receive for him; as to a clerk in a store,<sup>3</sup> or to the attorney of a creditor who has left his claim for collection.<sup>4</sup> And if the creditor designedly absents himself from home, for the fraudulent purpose of avoiding a tender, he cannot object that no tender was made to him personally.<sup>5</sup> If there be several joint creditors, a tender to one of them is sufficient,<sup>6</sup> but it must be pleaded to be to all.<sup>7</sup>

§ 1003. The debtor must tender the whole amount of the debt to his creditor, and a tender of a part of it only is void, because the creditor is not bound to accept a part;<sup>8</sup> and this is specially the case where the tender is of a part of a sum due under an *entire* contract.<sup>9</sup> But if there be several distinct sums of money, he may tender one of the sums, declaring

<sup>1</sup> Cropp *v.* Hambleton, Cro. Eliz. R. 48; Bac. Abr. Tender, *a*; Read *v.* Goldring, 2 M. & S. R. 86; Watkins *v.* Ashwicke, 1 Cro. Eliz. R. 132; Harding *v.* Davies, 2 Car. & Payne, R. 78.

<sup>2</sup> Goodland *v.* Blewith, 1 Camp. R. 477; Moffat *v.* Parsons, 5 Taunt. R. 307; Anon. 1 Esp. R. 349; Wilmot *v.* Smith, 3 C. & P. R. 453; s. c. 1 Mood. & Malk. R. 238; Hoyt *v.* Byrnes, 2 Fairf. R. 475; Watson *v.* Hetherington, 1 Car. & Kirw. R. 36; Kirton *v.* Braithwaite, 1 Mees. & Welsb. R. 310; Smith *v.* Goodwin, 4 Barn. & Adolph. R. 413.

<sup>3</sup> Hoyt *v.* Byrnes, 2 Fairf. R. 475; Moffat *v.* Parsons, 5 Taunt. R. 307.

<sup>4</sup> Tender to an attorney is good, although he then untruly denies his authority. McIniffe *v.* Wheelock, 1 Gray, R. 600. See, also, Watson *v.* Hetherington, 1 Car. & Kir. R. 36; Crozer *v.* Pilling, 4 Barn. & Cres. R. 28; Kirton *v.* Braithwaite, 1 Mees. & Welsb. R. 313.

<sup>5</sup> Southwick *v.* Smith, 7 Cush. R. 391.

<sup>6</sup> Douglas *v.* Patrick, 3 T. R. 683; Oatman *v.* Walker, 33 Maine R. 67.

<sup>7</sup> Douglas *v.* Patrick, 3 T. R. 683.

<sup>8</sup> Boyden *v.* Moore, 5 Mass. R. 365; Dixon *v.* Clark, 5 Com. B. R. 365. He need not tender for an attorney's letter. Kirton *v.* Braithwaite, 1 M. & W. R. 313.

<sup>9</sup> Dixon *v.* Clarke, 5 Man. Grang. & Scott, R. 365.

that the tender is made for that sum.<sup>1</sup> So, also, a tender of one gross sum to several creditors, all being present when the tender is made, sufficient to cover all their claims, and which they refuse on the ground of its being inadequate, is a good tender.<sup>2</sup> But if a gross sum be tendered to one creditor by several debtors to cover all their debts, it is not a good tender for each.<sup>3</sup> A tender of a gross sum upon several demands by same debtor is good, without specifying the amount tendered on each.<sup>4</sup>

§ 1003 a. So, also, the tender must be *absolute*;<sup>5</sup> and if it be coupled with a condition; as if the creditor will give a receipt or release in full;<sup>6</sup> or if it be offered as a present, with a denial that it is justly due;<sup>7</sup> or if it be offered in full of all demands;<sup>8</sup> or, indeed, if any other terms be added which the

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<sup>1</sup> Bro. Tend. pl. 39; Bac. Abr. Tender, (B.); Latch, R. 70.

<sup>2</sup> Black *v.* Smith, 1 Peake, R. 88.

<sup>3</sup> Goodland *v.* Blewith, 1 Camp. R. 477.

<sup>4</sup> Thetford *v.* Hubbard, 22 Verm. R. 440.

<sup>5</sup> Evans *v.* Judkins, 4 Camp. R. 156; Strong *v.* Harvey, 3 Bing. R. 304; 11 Moore, R. 72; Bevans *v.* Rees, 5 M. & W. R. 306; Loring *v.* Cooke, 3 Pick. R. 48; Hepburn *v.* Auld, 1 Cranch, R. 321; Brown *v.* Gilmore, 8 Greenl. R. 107; Thayer *v.* Brackett, 12 Mass. R. 450; Jennings *v.* Major, 8 Car. & Payne, R. 61; Richardson *v.* Boston Chemical Laboratory, 9 Metcalf, R. 42.

<sup>6</sup> Ryder *v.* Lord Townsend, 7 Dowl. & Ryl. R. 119; Laing *v.* Meader, 1 Car. & Payne, R. 257; Griffith *v.* Hodges, Ibid. 419; Robinson *v.* Ferreday, 8 Ibid. 752; Richardson *v.* Jackson, 8 Mees. & Welsb. R. 298; Loring *v.* Cooke, 3 Pick. R. 48; Hepburn *v.* Auld, 1 Cranch, R. 321.

<sup>7</sup> Simmons *v.* Wilmott, 3 Esp. R. 91; Sutton *v.* Hawkins, 8 Car. & Payne, R. 259.

<sup>8</sup> Glasscott *v.* Day, 5 Esp. N. P. C. R. 48; Thayer *v.* Brackett, 12 Mass. R. 450; Suton *v.* Hawkins, 8 Car. & Payne, R. 259; Mitchell *v.* King, 6 Ibid. 237; Strong *v.* Harvey, 3 Bing. R. 304; Foord *v.* Noll, 2 Dowl. N. S. R. 617. In Wood *v.* Hitchcock, 20 Wend. R. 47, a tender was made on condition of a full discharge, and Cowen, J., said: "Very likely the defendant, when he made the tender, owed the plaintiff, in the whole, more than eighty-five dollars, but has succeeded, by raising technical difficulties, in reducing the report to that sum. Independent of that, however, the tender was defective. It was clearly

acceptance of the money would cause the other party to admit,<sup>1</sup> the tender would not be good. If the obligation be to give one of two things in the alternative, at the option of the obligee, the tender should be of both.<sup>2</sup> If a tender be made of a greater amount than that which is due, it will not be considered good, unless it appear that the sum offered could be changed by the other party so as to render it equivalent to the debt;<sup>3</sup> or unless the excess be remitted by the debtor. But a tender with a demand, that the other party shall perform a duty imposed upon him by law, would be good;<sup>4</sup> and so, also, is a

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a tender to be accepted as the whole balance due, which is holden bad by all the books. 2 Phil. Ev. 7th ed. 133, 134; Evans *v.* Judkins, 4 Camp. R. 156; Cheminant *v.* Thornton, 2 Car. & Payne, R. 50; and Peacock *v.* Dickerson, in a note, Id. 51; Strong *v.* Harvey, 3 Bing. R. 304; Mitchell *v.* King, 6 Car. & Payne, R. 237. The tender was also bad, because the defendant would not allow that he was even liable to the full amount of what he tendered. His act was within the rule which says he shall not make a protest against his liability. 2 Phil. Ev. 7th ed. 134; Simmons *v.* Wilmott, 3 Esp. R. 91. He must also avoid all counter claim, as of a set-off against part of the debt due. 2 Phil. Ev. 7th ed. 134; 1 Chit. Gen. Pr. 508; Brady *v.* Jones, 2 Dowl. & Ryl. R. 305.

"That this defendant intended to impose the terms or raise the inference that the acceptance of the money should be in full, and thus conclude the plaintiff against litigating all further or other claim, the referees were certainly entitled to say. That the defendant intended to question his liability to part of the amount tendered is equally obvious, and his object was at the same time to adjust his counter claim. It is not of the nature of a tender to make conditions, terms, or qualifications; but simply to pay the sum tendered as for an admitted debt. Interlarding any other object will always defeat the effect of the act as a tender. Even demanding a receipt, 2 Phil. Ev. 7th ed. 134, or an intimation that it is expected, as by asking, 'Have you got a receipt?' will vitiate. Ryder *v.* Townsend, 7 Dowl. & Ryl. R. 119. The demand of a receipt in full would of course be inadmissible."

<sup>1</sup> Per Lord Abinger, Hastings *v.* Thorley, 8 Car. & Payne, R. 573; Huxam *v.* Smith, 2 Camp. R. 19.

<sup>2</sup> Fordley's case, 1 Leon. R. 68.

<sup>3</sup> Wade's case, 5 Rep. R. 114; Bevans *v.* Rees, 5 M. & W. R. 306; Bevan *v.* Ree, 7 Dowl. R. 510; Betterbee *v.* Davis, 3 Camp. R. 70; Black *v.* Smith, Peake, R. 88; Cadman *v.* Lubbock, 5 Dowl. & Ryl. R. 289.

<sup>4</sup> Saunders *v.* Frost, 5 Pick. R. 259.

tender under protest.<sup>1</sup> But the question whether a tender be made *conditionally* or not is for a jury; and the fact that the ground on which the creditor founded his refusal to accept was not because of its condition, is evidence of a waiver of that objection.<sup>2</sup>

§ 1004. A mere offer to pay is not ordinarily sufficient, but the money must be actually produced at the time of the tender, and the tender must be to pay it over immediately.<sup>3</sup> Yet if the creditor expressly dispense with its production, it need not be shown, although otherwise it must;<sup>4</sup> for great importance is attached to the production of the money, as the sight of it might tempt the creditor to yield and accept it.<sup>5</sup> The bare refusal to accept the proposed sum and a demand for more is not, of itself, sufficient to excuse the production of the money.<sup>6</sup> A tender must be of money actually in hand or near by, so that it can at once be produced; and if it be distant; or if, a bank check being offered, it be not drawn; or if the offerer have not the money and must borrow it; the tender would not be good,<sup>7</sup> although the production of the money be expressly dispensed with. Whether there were an actual or implied dis-

<sup>1</sup> Manning *v.* Lunn, 2 Car. & Kirw. R. 13; Gassett *v.* Andover, 21 Verm. R. 342.

<sup>2</sup> Richardson *v.* Jackson, 8 Mees. & Welsb. R. 298; Eckstein *v.* Reynolds, 7 Adolph. & Ell. R. 80; Saunders *v.* Frost, 5 Pick. R. 259.

<sup>3</sup> Blight *v.* Ashley, 1 Peters, C. C. R. 24; Slingerland *v.* Morse, 8 Johns. R. 474; Breed *v.* Hurd, 6 Pick. R. 356; Brown *v.* Gilmore, 8 Greenl. R. 107; Bakeman *v.* Pooler, 15 Wend. R. 637; Harding *v.* Davies, 2 C. & P. R. 77; Finch *v.* Brook, 1 Scott, R. 70; Sands *v.* Lyon, 18 Conn. R. 18.

<sup>4</sup> Douglas *v.* Patrick, 3 T. R. 683; Leatherdale *v.* Sweepstone, 3 Car. & Payne, R. 342; Dickinson *v.* Shee, 4 Esp. R. 68; Dunham *v.* Jackson, 6 Wend. R. 22; Read *v.* Goldring, 2 M. & S. R. 86.

<sup>5</sup> Per Vaughan, J., Finch *v.* Brook, 1 Bing. N. C. R. 253.

<sup>6</sup> Dunham *v.* Jackson, 6 Wend. R. 22.

<sup>7</sup> Ibid. In Harding *v.* Davies, 2 Car. & Payne, R. 77, Best, C. J., says: "It would not do if a man said, I have got the money, but must go a mile and fetch it." Breed *v.* Hurd, 6 Pick. R. 356; Brown *v.* Gilmore, 8 Greenl. R. 107; Fuller *v.* Little, 7 N. Hamp. R. 535; Sargent *v.* Graham, 5 Ibid. 440; Wheeler *v.* Knaggs, 8 Ohio R. 169; Bakeman *v.* Pooler, 15 Wend. R. 637.

pensation of the production of the money, which alone absolves the offerer, is a question for a jury to determine; but it will not be inferred by the court where the jury finds the special matter, without finding any dispensation.<sup>1</sup> The creditor has a right to demand a tender in money or in coin. But a tender of bank-notes, or treasury notes, or a check, is a sufficient tender, unless objection be made at the time by the creditor to receiving payment in them.<sup>2</sup>

§ 1005. The plea of a tender should be, that the debtor is, and always has been, ready to pay, from the time the money was payable. If, therefore, it be specially pleaded that, either before or after tender, there was a demand by the creditor, and a refusal by the debtor, the tender will be of no avail as a defence.<sup>3</sup>

§ 1005 a. Where the tender is not of money but of specific articles, it is not sufficient ordinarily to tender them to the person of the creditor wherever he may be, but they must be tendered at a proper place.<sup>4</sup> Where there is an express agreement as to the place where the goods shall be delivered, they must be offered at such place.<sup>5</sup> Where there is no agreement as to place, the question where they should be tendered depends on the circumstances of the case, the nature of the contract, and of the articles. In cases of sale, if no place of

<sup>1</sup> Finch *v.* Brook, 1 Bing. R. (N. S.) 257.

<sup>2</sup> Bank of United States *v.* Bank of Georgia, 10 Wheat. R. 334; Thorndike *v.* United States, 2 Mason, R. 1; Snow *v.* Perry, 9 Pick. R. 542; Polglass *v.* Oliver, 2 C. & J. R. 15; Jones *v.* Arthur, 8 Dowl. R. 442; Betterbee *v.* Davis, 3 Camp. R. 70; Warren *v.* Mains, 7 Johns. R. 476; Wheeler *v.* Knaggs, 8 Ohio R. 172; Towson *v.* Havre de Grace Bank, 6 Har. & Johns. R. 53.

<sup>3</sup> 1 Saund. 33 b, note (2); Bull. N. P.; Poole *v.* Tumbridge, 2 M. & W. R. 223; Cotton *v.* Godwin, 7 Mees. & Welsb. R. 147; Dixon *v.* Clark, 5 Com. B. R. 365; Rose *v.* Brown, Kirb. R. 295.

<sup>4</sup> 2 Greenl. Evid. § 609.

<sup>5</sup> See ante, § 807, and cases cited; Goodwin *v.* Holbrook, 4 Wend. R. 380; Savage Manufacturing Co. *v.* Armstrong, 19 Maine R. 147.

delivery be appointed, a tender of the goods at the place where they are sold is sufficient;<sup>1</sup> but if they be mixed up with other similar goods, they should be set aside and marked so that there may be no doubt as to their exact identity.<sup>2</sup> Where the agreement is to pay a debt by the delivery of specific articles, at a time certain, no place being fixed, the tender of such articles should in the absence of circumstances indicating the contrary, be at the residence or place of business of the creditor, if they be portable.<sup>3</sup> But if they be *cumbrous* and no place is appointed or is to be inferred from the nature of the contract or the circumstances of the case, the creditor may appoint a reasonable place of delivery, and if he refuse or neglect to do so upon request of the debtor, a tender by the debtor at any reasonable and proper place will be sufficient.<sup>4</sup> But if the contract be to pay a note or debt of any kind on demand, or if no time or place be fixed, they are deliverable at the place where they are,<sup>5</sup> on a demand.

§ 1005 b. Where the time of delivery is fixed, the tender should be at the time agreed, unless the time fall on a Sunday, in which case a tender on Monday is sufficient.<sup>6</sup> If a

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<sup>1</sup> Bronson *v.* Gleason, 7 Barb. R. 472; Barr *v.* Myers, 3 Watts & Serg. R. 295.

<sup>2</sup> Veazy *v.* Harmony, 7 Greenl. (Bennett's ed.) R. 91. See ante, § 800, § 801; Barney *v.* Bliss, 1 D. Chipman, R. 399.

<sup>3</sup> 2 Kent, Comm. Lect. 39, pp. 507, 508, and cases cited; 2 Greenl. Evid. § 609; Chipman on Contracts, p. 24, 25, 26; Goodwin *v.* Holbrook, 4 Wend. R. 377; Barr *v.* Myers, 3 Watts & Serg. R. 295; Roberts *v.* Beatty, 2 Penn. R. 63; Aldrich *v.* Albee, 1 Greenl. (Bennett's ed.) R. 120; Bronson *v.* Gleason, 7 Barb. R. 472.

<sup>4</sup> 2 Kent, Comm. Lect. 39, p. 506 to 509; ante, § 807, and cases cited; 2 Greenl. on Evid. § 610; Howard *v.* Miner, 2 App. R. (20 Maine), 325; Lamb *v.* Lathrop, 13 Wend. R. 95; Peck *v.* Hubbard, 11 Verm. R. 612; Russell *v.* Ormsbee, 10 Verm. R. 274.

<sup>5</sup> Lobdell *v.* Hopkins, 5 Cowen, R. 518; Vance *v.* Bloomer, 20 Wend. R. 196; Rice *v.* Churchill, 2 Denio, R. 148; Scott *v.* Crane, 1 Conn. R. 255; Mason *v.* Briggs, 16 Mass. R. 453; Slingerland *v.* Morse, 8 Johns. R. 474.

<sup>6</sup> Barrett *v.* Allen, 10 Ohio R. 426; Avery *v.* Stewart, 2 Conn. R. 69; Salter *v.* Burt, 20 Wend. R. 205.

particular day be designated as the time of delivery, the goods may be tendered at any time during the day, but sufficient time before sunset should be allowed to enable the creditor to examine and receive them.<sup>1</sup> A tender or delivery during the evening is not good.<sup>2</sup> If the time be fixed and the payee have the right to appoint the place, he should give notice of the place he elects at a reasonable time before the delivery is to take place, so as to enable the debtor to make a tender there.<sup>3</sup> If the agreement be to deliver goods within a certain number of days, the time is ordinarily to be computed exclusive of the day on which the contract is made,<sup>4</sup> unless there be

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<sup>1</sup> *Startup v. Macdonald*, 7 Scott, N. S. R. 285, 287. See ante, § 809; *Aldrick v. Albee*, 1 Greenl. R. (Bennett's ed.) 120; *Savary v. Goe*, 3 Wash. C. C. R. 140.

<sup>2</sup> *Startup v. Macdonald*, 7 Scott, N. S. R. 285; *Sweet v. Harding*, 19 Verm. R. 587.

<sup>3</sup> *Howard v. Miner*, 20 Maine R. 325.

<sup>4</sup> *Bigelow v. Willson*, 1 Pick. R. 485. In this case, Mr. Justice Wilde says: "Before the case of *Pugh v. The Duke of Leeds*, all the cases agree that the words, 'from the day of the date,' are words of exclusion. So plain was this meaning thought to be, that leases depending on this rule of construction were uniformly declared void, against the manifest intention of the parties. Of this doctrine, thus applied, Lord Mansfield very justly complains, not, however, on the ground that the general meaning of the words had been misunderstood, but because the plain intention of the parties to the contract had been disregarded. All that was decided in that case was, that 'from the day of the date' might include the day, if such was the clear intention of the contracting parties; and not that such was the usual signification of the words. I think, therefore, we are warranted by the authorities to say, that when time is to be computed from or after the day of a given date, the day is to be excluded in the computation. And that this rule of construction is never to be rejected, unless it appears that a different computation was intended. So, also, if we consider the question independent of the authorities, it seems to me impossible to raise a doubt. No moment of time can be said to be after a given day, until that day has expired." *Pellew v. Wonford*, 9 Barn. & Cres. R. 134; *Webb v. Fairmaner*, 3 Mees. & Welsb. R. 473; *Hardy v. Ryle*, 9 Barn. & Cres. R. 603; *Wilkenson v. Gaston*, 9 Q. B. 141; *Gorst v. Lowndes*, 11 Sim. R. 434; *Wiggin v. Peters*, 1 Metcalf, R. 127; *Farwell v. Rogers*, 4 Cush. R. 460; *Bissell v. Bissell*, 11 Barb. R. 96; *Weeks v. Hull*, 19 Conn. R.

circumstances indicating a different intention, in which case the construction of the contract must follow the intention of the parties.<sup>1</sup> Where no time is fixed for delivery of goods, they are ordinarily deliverable in demand, but the demand must be such as to give reasonable time to the debtor to make delivery.<sup>2</sup>

§ 1005 c. Where time and place are fixed, a tender of the goods at such time and place is sufficient, although there be no person there to receive them;<sup>3</sup> and in such case the debtor after the tender must be understood to hold them as bailee of the creditor.<sup>4</sup> If the delivery be at the store of the debtor, it is not sufficient that he avers himself to have been ready to deliver, if it appear that the goods were not set apart and identified.<sup>5</sup> Where a debt is to be paid in specific articles, at a fixed time and place, no demand is necessary at such time and place by the plaintiff to enable him to sustain an action.<sup>6</sup>

§ 1005 d. A tender of goods as of money must be absolute and unconditional, and must be made so that the person to

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376; *Cornell v. Moulton*, 3 Denio, R. 12; *Thomas v. Afflick*, 16 Penn. St. R. 14; *Styles v. Wardle*, 4 Barn. & Cres. R. 908.

<sup>1</sup> *Pugh v. Leeds*, Cowp. R. 714; *Lester v. Garland*, 15 Ves. R. 248; *Bigelow v. Willson*, 1 Pick. R. 485.

<sup>2</sup> *Russell v. Ormsbee*, 10 Verm. R. 274; *Bailey v. Simonds*, 6 N. Hamp. R. 159.

<sup>3</sup> *Gilmore v. Holt*, 4 Pick. R. 258; *Southworth v. Smith*, 7 Cush. R. 391.

<sup>4</sup> 2 Kent, Comm. Lect. 39, p. 509. See ante, § 800; *Smith v. Loomis*, 7 Conn. R. 110; *Lamb v. Lathrop*, 13 Wend. R. 95; *Slingerland v. Morse*, 8 Johns. R. 474.

<sup>5</sup> *Barney v. Bliss*, 1 D. Chipman, R. 399; *Veazy v. Harmony*, 7 Greenl. R. (Bennett's ed.) 91; *Newton v. Galbraith*, 5 Johns. R. 119; *Leballister v. Nash*, 24 Maine R. 316; *Bates v. Churchill*, 32 Maine R. 31; *Wyman v. Winslow*, 2 Fairf. R. 398. See also ante, § 800, § 801; *Robbins v. Luce*, 4 Mass. R. 474; *Barns v. Graham*, 4 Cowen, R. 452.

<sup>6</sup> *Fleming v. Potter*, 7 Watts, R. 380; *Thomas v. Roosa*, 7 Johns. R. 461; *Townsend v. Wells*, 3 Day, R. 327; *White v. Perley*, 15 Maine R. 470; *Games v. Manning*, 2 Greene, R. 251.

whom they are tendered may have an opportunity to examine them.<sup>1</sup> When the person to whom goods are to be delivered is out of the State, it would seem to be the duty of the debtor, in all cases where no place of delivery has been fixed or is implied from the circumstances of the case, to inquire of him where the goods shall be delivered, and to comply with his directions if they be reasonable and proper, but he would not be bound to follow him out of the State for the purpose of delivery.<sup>2</sup> If the creditor should refuse or neglect to appoint a reasonable place, the debtor may make a tender at any reasonable and proper place.

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<sup>1</sup> Isherwood *v.* Whitmore, 10 Mees. & Welsb. R. 757; s. c. 11 Mees. & Welsb. R. 347.

<sup>2</sup> Co. Litt. 210; Smith *v.* Smith, 25 Wend. R. 405; 2 Hill, R. 351; Howard *v.* Miner, 20 Maine R. 325. But see White *v.* Perley, 1<sup>o</sup> Maine R. 470; Bixby *v.* Whitney, 5 Greenl. R. 192. In relation to this last case, Prof. Greenleaf in his Treatise on Evidence, § 611 note, says: “Whether if the creditor is out of the State, no place of delivery having been agreed upon, this circumstance gives to the debtor the right of appointing the place, *quare*; and see Bixby *v.* Whitney, 5 Greenl. R. 192; in which, however, the reporter’s marginal note seems to state the doctrine a little broader than the decision requires, it not being necessary for the plaintiff, in that case, to aver any readiness to receive the goods, at any place, as the contract was for the payment of a sum of money, in specific articles, on or before a day certain.”

## CHAPTER X.

## STATUTE OF LIMITATIONS.

§ 1006. In the next place, the *Statute of Limitations* may be pleaded as a defence to an action upon a contract. At common law, no lapse of time creates a bar to an action, although it may raise a presumption of payment.<sup>1</sup> The limitations of actions within a certain time is, therefore, prescribed by the statute, 21 Jac. I., called the Statute of Limitations.

§ 1007. The third section of this statute enacts, "that all actions of account, and upon the case, (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors, or servants,) and all actions of debt founded upon any lending or contract, without specialty; and all actions of debt for arrearages of rent shall be commenced and sued within six years next after the cause of such action or suit, and not after."

§ 1008. This statute applies to the action of *assumpsit*,<sup>2</sup> to

<sup>1</sup> *Cooper v. Turner*, 2 Stark. R. 497; *Dowthwaite v. Tibbut*, 5 Maule & Selw. R. 75; *Sellen v. Norman*, 4 Car. & Payne, R. 81; *Attleborough v. Middleborough*, 10 Pick. R. 378. The lapse of twenty years affords a presumption of the payment of a specialty debt. *Tidd's Pr.* 9th ed. 18. *Foulk v. Brown*, 2 Watts, R. 214; 2 Phillips, Ev. (*Cowen & Hill's ed.*) 31, et seq. notes, part I.

<sup>2</sup> *Piggott v. Rush*, 4 Ad. & El. R. 912; *Williams v. Williams*, 5 Ohio R. 444; *Haven v. Foster*, 9 Pick. R. 112.

all actions upon a written or parol contract, whether at law or in equity;<sup>1</sup> and is reenacted in the different States in the United States.

§ 1009. The exception in this statute, with regard to accounts between merchant and merchant is a saving, as it has been said, of accounts, and not of actions; and applies only to such actions as respect accounts.<sup>2</sup> It has been held, from the earliest time, not to be applicable to *stated* accounts.<sup>3</sup> Whether it be applicable to accounts closed, or only to accounts current, has been much questioned; but the great weight of authority leaves little doubt that it only applies to accounts running within the space of six years.<sup>4</sup> Such, at least, has been the prevalent opinion in England ever since the decision by Lord Hardwicke, in *Welford v. Liddell*.<sup>5</sup> So,

<sup>1</sup> *Battley v. Faulkner*, 3 B. & Ald. R. 294; *Linsell v. Bonsor*, 2 Bing. N. C. R. 245; *Linley v. Bousor*, 2 Scott, R. 403; *Spring v. Gray*, 5 Mason, R. 524.

<sup>2</sup> *Webber v. Tivill*, 2 Saund. R. 125; 1 Mod. R. 269; *Spring v. Gray*, 5 Mason, R. 525; s. c. 6 Peters, R. 151; *Inglis v. Haigh*, 8 Mees. & Welsb. R. 769; *Robinson v. Alexander*, 8 Bligh, New Series, R. 352; *Cottam v. Partridge*, 4 Scott, N. R. 819.

<sup>3</sup> *Webber v. Tivill*, 2 Saund. R. 125; *Sandys v. Blodwell*, W. Jones, R. 401; *Martin v. Delbo*, 1 Sid. R. 465; *Farrington v. Lee*, 1 Mod. R. 269; *Toland v. Sprague*, 12 Pet. S. C. R. 300; *Spring v. Gray*, 5 Mason, R. 525.

<sup>4</sup> In this country it has been held to apply to closed accounts, in *Mandeville v. Wilson*, 5 Cranch, R. 15; in *Bass v. Bass*, 6 Pick. R. 362; in *Davis v. Smith*, 4 Greenl. R. 339; *Spring v. Gray*, 6 Peters, R. 151; *Watson v. Lyle*, 4 Leigh, R. 236; *Coalter v. Coalter*, 1 Rob. Virg. R. 79; *Patterson v. Brown*, 6 Monroe, R. 10; *Ogden v. Astor*, 4 Sandf. R. 329; *Dyott v. Letcher*, 6 J. J. Marsh. R. 541. The same rule is held in England in *Sherman v. Sherman*, 2 Vern. R. 276; s. c. Eq. Cas. Abr. 12; *Sandys v. Blodwell*, W. Jones, R. 401; *Catling v. Skoulding*, 6 T. R. 193; *Robinson v. Alexander*, 8 Bligh, n. s. R. 352; *Inglis v. Haigh*, 8 Mees. & Welsb. R. 769. But see, contra, in England, *Welford v. Liddel*, 2 Ves. R. 400; *Martin v. Heathcote*, 2 Eden, R. 169; *Barber v. Barber*, 18 Ves. R. 286; *Foster v. Hodgson*, 19 Ves. R. 180; *Ault v. Goodrich*, 4 Russ. R. 430. And in this country in *Coster v. Murray*, 5 Johns. Ch. R. 522; 20 Johns. R. 576; *Van Rhyn v. Vincent*, 1 McCord, Ch. R. 310; *Didier v. Davison*, 2 Barb. Ch. R. 477.

<sup>5</sup> 2 Ves. R. 400; *Coster v. Murray*, 5 Johns. Ch. 522, and cases cited;

also, the exception applies only to cases of mutual accounts, where there is a buying and selling of goods, and an account properly arising therefrom.<sup>1</sup> The exception is confined also to accounts between merchants, or their factors and servants, in the strictest acceptation of the term,<sup>2</sup> and does not extend to shopkeepers;<sup>3</sup> nor to accounts between merchants as partners.<sup>4</sup> And it has been held, that such claims as bills of exchange,<sup>5</sup> or contracts to relieve half the profits of a voyage instead of freight,<sup>6</sup> were not merchants' accounts within the exception. Nor are actions of *indebitatus assumpsit* within the exception, but only actions of account, and perhaps ac-

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Spring *v.* Gray, 5 Mason, R. 528; s. c. 6 Peters, S. C. R. 151; Union Bank *v.* Knapp, 3 Pick. R. 96; Cottam *v.* Partridge, 4 Man. & Grang. R. 271; s. c. 4 Scott, N. R. 819.

<sup>1</sup> Webber *v.* Tivill, 2 Saund. R. 125; Coster *v.* Murray, 5 Johns. Ch. R. 522; s. c. 20 Johns. R. 576; Ingram *v.* Sherard, 17 Serg. & R. R. 347; Union Bank *v.* Knapp, 3 Pick. R. 113; Mandeville *v.* Wilson, 5 Cranch, R. 15; Spring *v.* Gray, 5 Mason, R. 528.

<sup>2</sup> Blair *v.* Drew, 6 N. H. R. 235; Codman *v.* Rogers, 10 Pick. R. 118; Spring *v.* Gray, 5 Mason, R. 528; s. c. 6 Peters, S. C. R. 151; Farmers Bank *v.* Planters Bank, 10 Gill & Johns. R. 422; McCulloch *v.* Judd, 20 Ala. R. 703; Marseilles *v.* Kenton, 17 Penn. St. R. 238; Smith *v.* Dawson, 10 B. Monroe, R. 112; Bevan *v.* Cullen, 7 Barr, R. 281; Thompson *v.* Fisher, 1 Harris, R. 310; Fox *v.* Fisk, 6 V. E. How. R. 328.

<sup>3</sup> Farrington *v.* Lee, 1 Mod. R. 268. In this case Atkyns, J., said: "I think the makers of this statute had a greater regard to the persons of merchants than the causes of action between them. And the reason was because they are often out of the realm, and cannot always prosecute their actions in due time. I think also that no other sort of tradesmen but merchants are within the benefit of this exception, and that it does not extend to shopkeepers, they not being within the same mischief." See, also, Cottam *v.* Partridge, 4 Scott, N. R. 819.

<sup>4</sup> Bridges *v.* Mitchell, Bunb. R. 217; Patterson *v.* Brown, 6 Monroe, R. 10; Coalter *v.* Coalter, 1 Rob. Virg. R. 79; Lansdale *v.* Brashear, 3 Monroe, R. 330. But see Ogden *v.* Astor, 4 Sandf. R. 327.

<sup>5</sup> Chievly *v.* Bond, 4 Mod. R. 105.

<sup>6</sup> Spring *v.* Gray, 5 Mason, R. 505; s. c. 6 Peters, R. 155; Forbes *v.* Skelton, 8 Sim. R. 335.

tions of account, and actions on the case for not accounting.<sup>1</sup>

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<sup>1</sup> *Inglis v. Haigh*, 8 Mees. & Welsb. R. 769. In this case, which was an action of *indebitatus assumpsit* in which the plaintiff declared for work and labor, money lent, money paid, and for interest, to which the statute of limitations was pleaded. Mr. Baron Parke said: "The plea of the Statute of Limitations is a complete bar, unless the plaintiff, by his replication, can take the case out of its operation. He attempts to do so by bringing it within the exception in the statute as to merchants' accounts. But we think that exception does not apply to an action of *indebitatus assumpsit* for the several items of which the account is composed, or for the general balance, but only to a proper action of account, or perhaps also an action on the case for not accounting.

" Although there is no reported case expressly governing the present, yet there are many coming very near it, and in which the *dicta* of very eminent judges fully warrant the view we take of the subject.

" *Webber v. Tivill*, 2 Saund. R. 124, was an action of *indebitatus assumpsit* for goods sold and delivered, money had and received, and on an account stated. Plea, the Statute of Limitations. Replication, that the money sought to be recovered became due and payable on trade between the plaintiff and defendant as merchants, and wholly concerned the trade of merchandise. The replication was held bad; and Morton, J., said, that *no action but an action of account was accepted*. The reporter, it is true, adds that the other judges said nothing thereto, but gave judgment for the defendant without assigning their reasons. And certainly, in that case, as part of the demand was on an account stated, and even the residue did not appear to have accrued due in a course of mutual accounts, it was not necessary to go the full length of what was said by Morton, J.

" So in *Martin v. Delboe*, 1 Mod. R. 70; 1 Vent. R. 89, Twisden, J., is reported to have said, 'I never knew but that the word *accounts* in the statute was taken only for actions of account.' That case, however, was an action of *assumpsit* on a promise to pay a certain sum out of the proceeds of goods sent to the defendant as a merchant, beyond sea, and the court doubting whether it appeared on the declaration or not to be on an account stated, gave leave to discontinue; so that the question, whether the statute applies to actions of account only, was not decided. The same observation applies to the case of *Farrington v. Lee*, 1 Mod. R. 269, and 2 Mod. R. 311.

" In none of these cases did the facts necessarily call for a decision, whether the exception did or did not at all apply to actions of *assumpsit*. Still the *dicta* of the judges in those cases are entitled to great weight, unopposed as they are by any conflicting authority whatever.

" But independently of authority, we are of opinion that the reasonable

§ 1010. The seventh section of this statute enacts, "that if any person or persons, that is, or shall be entitled to any such

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construction of the statute requires such a restriction as the *dicta* of the judges, in the cases we have referred to, clearly sanction. The words are—'all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants.' Now, as was said by Scroggs, J., in the case of *Farrington v. Lee*, if the legislature had meant to include in the exception other actions than actions of account, the language would probably have been 'other than such actions as concern the trade of merchandise,' and not 'other than such accounts.' Indeed, it is difficult to say that an action of *indebitatus assumpsit* for goods sold and delivered, or for money had and received, can, under any circumstances, be described as an action having any reference to accounts: it would have been still more difficult to say so at the time when the Statute of Limitations was passed.

"Where a merchant plaintiff brings an action for goods sold and delivered, money paid, or any of the other items which may constitute his demand against the merchant defendant with whom he has had mutual dealings, he is rather repudiating than enforcing accounts. Indeed, by the comparatively modern statutes of set-off, the defendant may now have the benefit of his counter demands; but that was not the case at the date of the Statute of Limitations ; and we must construe the statute now as it ought to have been construed immediately after it became law. At that time there was no proceeding at law by which mutual demands could be set against each other, except by action of account, and consequently there was no other action in any manner connected with accounts properly so called. It does not at all vary the case, that the plaintiff only seeks to recover what he calls the balance due on the account. If that balance had been stated and agreed to, then all the authorities show that it is altogether out of the exception. If it has not been stated and agreed to, then it is only what the plaintiff chooses to call a balance, the accuracy of which the defendant had, at the time of passing the Statute of Limitations, no means of disputing in an action of *assumpsit*.

"Our view of the case is much assisted by considering that the exception clearly would not apply to an action of debt, brought for the very same demand ; and it is difficult to believe that the legislature could have intended to preserve the right in one form of action, but to bar it in another." In *Cottam v. Partridge*, 4 Scott, N. R. 819, Chief Justice Tindal said : "In the late case of *Inglis v. Haigh*, 8 Mees. & Welsb. R. 769, the Court of Exchequer seems to have decided that the exception as to merchants' accounts in the statutes of limitations applies only to an *action of account*, or perhaps

actions of accounts, or actions of debts, shall be at the time of any such cause of action given, or accrued, fallen, or to come, within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done."

§ 1010 a. Under this statute, it has been held that the party who avers a disability must prove it clearly;<sup>1</sup> but when a party is once shown to be within the exception, he will be presumed to remain within it until the case is taken out of the statute, unless the contrary be shown.<sup>2</sup> The person for whose use the suit is brought, is entitled to the benefit of the disability, as well as if he were the plaintiff of record.<sup>3</sup> A person

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also to an *action on the case for not accounting*, but not to an action of *indebitatus assumpsit*. Without going quite so far as that (though I by no means intend to impeach the propriety of that decision); I am of opinion that the exception will not apply except where an action of account is maintainable; and the ground upon which I rest the determination of the present case, is, that the circumstances are not such for which an action of account would lie." See, also, *Spring v. Gray*, 5 Mason, R. 505, and 6 Peters, R. 151, in which Chief Justice Marshall says: "From the association of actions on the case, a remedy given by the law for almost every claim for money, and for the redress of every breach of contract not under seal, with actions of account, which lie only in a few special cases; it may reasonably be conceived that the legislature had in contemplation to accept those actions only for which account would lie. Be this as it may, the words certainly require that the action should be founded on an account." See, also, *Toland v. Sprague*, 12 Peters, R. 300; *Didier v. Davison*, 2 Barb. Ch. R. 477. And see *Cottam v. Partridge*, 4 Scott, N. R. 819; *Toland v. Sprague*, 12 Pet. R. 300; *Didier v. Davison*, 2 Barbour, Ch. R. 477.

<sup>1</sup> *Hall v. Timmons*, 2 Richardson, Eq. R. 120.

<sup>2</sup> *Davis v. Sullivan*, 2 English, R. 449.

<sup>3</sup> *Ibid.*

laboring under any of the disabilities, of course, *may* bring his action during the disability, as a minor during his infancy.<sup>1</sup>

§ 1010 b. As to the persons mentioned in the seventh section, it has been held that a person born deaf and dumb is not a *non compos mentis*, unless such be proved to be fact, on an inquiry for that purpose;<sup>2</sup> and that a person held in slavery, is one "imprisoned" within the meaning of the act.<sup>3</sup>

§ 1010 c. In respect to these exceptional disabilities the rule is, that if the statute once attaches, it is not arrested and held in abeyance by any of them. If, therefore, the person is sane, or is in the country, or out of prison, when the cause of action arises, subsequent insanity or departure from the country, or imprisonment, will not suspend the operation of the statute.<sup>4</sup> So, also, if any of these disabilities exist when the cause of action arises and be temporarily suspended, the statute attaches at the moment the disability is suspended, and continues to run, although the disability subsequently occur.<sup>5</sup> Thus, if the debtor be out of the country when the cause of action arises, and subsequently return for a time, the statute attaches on his return, and his departure afterwards does not suspend its operation.<sup>6</sup>

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<sup>1</sup> *Chandler v. Vilett*, 2 Saund. R. 117, c. 1.

<sup>2</sup> *Brower v. Fisher*, 4 Johns. Ch. R. 441.

<sup>3</sup> *Matilda v. Crenshaw*, 4 Yerger, R. 299.

<sup>4</sup> *Smith v. Hill*, 1 Wils. R. 134; *Gray v. Mendez*, 1 Strange, R. 556; *Coventry v. Atherton*, 9 Ohio R. 34; *Ruff v. Bull*, 7 Har. & Johns. R. 14; *Prendergrast v. Foley*, 8 Geo. R. 1; *Young v. Mackall*, 4 Maryland, R. 362.

<sup>5</sup> *Ibid.* *Perry v. Jackson*, 4 T. R. 516; *Marsteller v. McLean*, 7 Cranch, R. 156; *Riggs v. Dooley*, 7 B. Monroe, R. 236; *Henry v. Means*, 2 Hill, (S. C.) R. 328.

<sup>6</sup> *Hysinger v. Baltzell*, 3 Gill & Johns. R. 158; *Fowler v. Hunt*, 10 Johns. R. 464; *Byrne v. Crowninshield*, 1 Pick. R. 263; *Randall v. Wilkins*, 4 Denio, R. 577; *State Bank v. Seawell*, 18 Ala. R. 616; *White v. Bailey*, 3 Mass. R. 271; *Howell v. Burnett*, 11 Geo. R. 303; *Little v. Blunt*, 16 Pick. R. 359.

But in such case the coming from abroad must not be clandestine, and with the intent to defraud the creditor by setting the statute in operation and then departing. It must be so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence and due means, of arresting the debtor.<sup>1</sup> So, also, it would seem necessary that the fact of the debtor's return should be known to the creditor, if the return was merely temporary,—though if the return were for a permanent residence, and publicly known, a constructive knowledge of such fact by the creditor would be created.<sup>2</sup> Where there are joint creditors, resident abroad, and one of them returns, the statute begins to run from the time of his return.<sup>3</sup> But where there are joint debtors resident abroad, on the return of one of them the statute does not begin to run;<sup>4</sup>

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<sup>1</sup> *Fowler v. Hunt*, 10 Johns. R. 464. See, also, *White v. Bailey*, 3 Mass. R. 271; *Hysinger v. Baltzell*, 3 Gill & Johns. R. 158.

<sup>2</sup> *Little v. Blunt*, 16 Pick. R. 359. In *Mazozon v. Foot*, 1 Aikens, R. 282, Skinner, C. J. said: "It cannot be supposed, nor does the defendant insist, that every coming or return into the State, would set the statute in operation. He admits it must be such, as that by due diligence, the creditor might cause an arrest. If the debtor should remove or return into the State publicly, and with a view to dwell and permanently reside within its jurisdiction, although in an extreme part from the place of his former residence, or that of the creditor, this would undoubtedly bring the case, by a correct construction of the statute, within its operation, though the creditor should have no knowledge of his return. So, too, if the debtor, having no intention to reside here, comes or returns into the State, and this is known to the creditor, and he has opportunity to arrest the body, the case is brought within the statute. In the latter case, it is necessary the creditor should be apprised of his debtor's being within the jurisdiction of this State." See, also, *Didier v. Davison*, 2 Sandf. Ch. R. 61; *Hill v. Bellows*, 15 Verm. R. 727; but in England the statute has been held to commence on the temporary return of the debtor, although not known to the creditor. *Gregory v. Hurrill*, 5 Barn. & Cres. R. 341; *Holl v. Hadley*, 2 Adolph. & Ell. R. 758. See, also, in this country, *State Bank v. Seawell*, 18 Ala. R. 616.

<sup>3</sup> *Perry v. Jackson*, 4 T. R. 516. See, also, *Marsteller v. McLean*, 7 Cranch, R. 156; *Henry v. Means*, 2 Hill, S. C. R. 328.

<sup>4</sup> *Fannin v. Anderson*, 7 Adolph. & Ell. N. S. R. 823.

and the reason of this rule is stated to be, that one plaintiff can act for the other and use their names in the action, and therefore, the protection of the statute is not needed. But with respect to defendants the reason does not apply, since the plaintiff cannot bring the absent defendants into court by any act of his, and if he be compelled to sue one of several co-defendants on his return, without joining the others who are absent, he may possibly recover against insolvent persons, and lose his remedy against the solvent ones who are absent.<sup>1</sup>

§ 1010 d. In respect to the phrase "returned from beyond the seas," it is not restricted to citizens who have left the country, but also extends to foreigners whose residence is out of the country, even although they have an agent residing therein;<sup>2</sup> for under the seventh section of Stat. James I. and in many American States, a creditor who has never been in the country has six years from the time of his coming there.<sup>3</sup>

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<sup>1</sup> Per Lord Denman, C. J., in *Fannin v. Anderson*, 7 Adolph. & Ell. N. S. R. 823.

<sup>2</sup> *Lafonde v. Ruddock*, 24 Eng. Law & Eq. R. 239; *Strithorst v. Graeme*, 3 Wils. R. 145; *Chomqua v. Mason*, 1 Gall. R. 342. In *Ruggles v. Keeler*, 3 Johns. R. 263, Kent, C. J. said: "Whether the defendant be a resident of this State, and only absent for a time, or whether he resides altogether out of the State, is immaterial. He is equally within the proviso. If the cause of action arose out of the State, it is sufficient to save the statute from running in favor of the party to be charged, until he comes within our jurisdiction. This has been the uniform construction of the *English* statutes, which also speak of the *return* from beyond seas of the party so absent. The word *return* has never construed to confine the proviso to *Englishmen* who went abroad occasionally. The exception has been considered as general, and extending equally to foreigners who reside always abroad." See, also, *Hall v. Little*, 14 Mass. R. 203; *Dunning v. Chamberlin*, 6 Verm. R. 127.

<sup>3</sup> *Strithorst v. Graeme*, 3 Wilson, R. 145; *Chomqua v. Mason*, 1 Gall. R. 342; *Ruggles v. Keeler*, 3 Johns. R. 263; *Von Hemert v. Porter*, 11 Met. R. 210; *McMillan v. Wood*, 29 Maine R. 217; *Lafonde v. Ruddock*, 24 Eng. Law & Eq. R. 239; *Graves v. Weeks*, 19 Verm. R. 178. In other States, absence of the plaintiff is no bar to the statute, if the defendant was an inhabi-

In the different statutes of the United States this phrase is altered to "beyond sea," "out of the State," "out of the country," "over the sea." And these expressions are generally construed to mean out of the jurisdiction of the State where the cause of action arises,<sup>1</sup> but in some States they are construed to mean out of the jurisdiction of the United States.<sup>2</sup>

. § 1010 e. A debtor can, however, only avail himself of the disabilities existing when the right of action first accrued; if no disability then exist, the time for bringing the action cannot be extended by a disability subsequently supervening.<sup>3</sup> So, if several disabilities exist together at the time when the right of action accrues, the statute does not begin to run until the party has survived them all.<sup>4</sup> But cumulative disabilities

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tant of the State. *Brian v. Tims*, 5 Eng. R. 597; *Smith v. Newby*, 13 Mo. R. 159; *Wynn v. Lee*, 5 Geo. R. 217; *Jones v. Hays*, 4 McLean, R. 521; *Snoddy v. Cage*, 5 Texas R. 106.

<sup>1</sup> *Faw v. Roberdean*, 3 Cranch, R. 174; *Bank of Alexandria v. Dyer*, 14 Peters, R. 141; *Brent v. Tasker*, 1 Har. & McHenry, R. 89; *Murray v. Baker*, 3 Wheaton, R. 541; *Shelby v. Guy*, 11 Wheat. R. 361; *Galusha v. Cobleigh*, 13 New Hamp. R. 79; *Richardson v. Richardson*, 6 Ohio R. 125; *Pancoast v. Addison*, 1 Harr. & Johns. R. 350; *Forbes v. Foot*, 2 McCord, R. 331; *Field v. Dickinson*, 3 Pike, R. 409.

<sup>2</sup> This is so in North Carolina. *Earle v. Dickson*, 1 Dev. R. 16; *Whitlocke v. Walton*, 2 Murph. R. 23. And in Pennsylvania, *Thurston v. Fisher*, 9 Serg. & Rawle, R. 288; and Missouri, *Fackler v. Fackler*, 14 Mo. R. 431; *Marvin v. Bates*, 13 Miss. R. 217. See, also, *Ward v. Hallam*, 2 Dall. R. 217; *Darling v. Meacham*, 2 Greene, R. 602; *Thurston v. Dames*, 9 Serg. & Rawle, R. 329.

<sup>3</sup> *Peck v. Randall*, 1 Johns. R. 165; *Dennis v. Anderson*, 2 H. & M. R. 289; *Dowell v. Webber*, 2 Smedes & Marsh. R. 452; *Dillard v. Philson*, 5 Strobb. R. 213; *Pendergrast v. Foley*, 8 Georgia R. 1; *Anderson v. Smith*, 2 McCord, R. 269.

<sup>4</sup> Per Chancellor Kent, *Demarest v. Wynkoop*, 3 Johns. Ch. R. 129; *Smith v. Burtis*, 9 Johns. R. 181; *Bonny v. Ridgard*, cited in 17 Ves. R. 99; *Sumner v. Tracey*, 3 P. Wms. R. 287, note; *Jackson v. Johnson*, 5 Cowen, R. 74; *Dugan v. Gittings*, 3 Gill, R. 138; *Butler v. Howe*, 13 Maine R. 397; *Sturt v. Mellish*, 2 Atk. R. 610.

occurring one after the other are not allowed, since if disability could be added to disability claims might be protracted to an indefinite extent of time.<sup>1</sup> If, therefore, the right of action accrue when the debtor is an infant, and before the termination of her infancy the disability of coverture occur, the statute runs from the time her infancy ceases, and not from the termination of her coverture.<sup>2</sup>

§ 1011. This statute begins to run upon a debt from the moment that there is a complete and present cause of action, a plaintiff within the country, capable of bringing the action, and a defendant capable of being sued. Thus, upon an agreement for the sale of goods, where payment is to be made at the end of six months, the statute begins to run on the expiration of the six months.<sup>3</sup> So, also, the statute begins to run upon a bill of exchange, or note, upon the last day of grace, if it be accepted; or upon the day of demand, if it be dishonored.<sup>4</sup> If it be not accepted, the statute begins at the non-acceptance, and not from the non-payment.<sup>5</sup> So, also, it

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<sup>1</sup> *Ibid.* Per Chancellor Kent, in *Demarest v. Wynkoop*, 3 Johns. Ch. R. 129. *Doe v. Jones*, 4 T. R. 300; *Doe dem. George v. Jesson*, 6 East, R. 80; *Stow v. Zouch, Plowd.* R. 353; *Doe v. Jones*, 4 T. R. 300; *Jackson v. Wheat*, 18 Johns. R. 40; *Mercer v. Selden*, 1 Howard, R. 37; *Bradstreet v. Clarke*, 12 Wend. R. 602; *Dease v. Jones*, 23 Missis. R. 133. The same rule is adopted in equity. *Demarest v. Wynkoop*, *supra*; *Smith v. Clay*, 3 Bro. Ch. R. 639, note; *Hovenden v. Annesley*, 2 Sch. & Lef. R. 630, 640; *Medlicott v. O'Donnell*, 1 Ball & Beat. R. 156; *Butler v. Howe*, 1 Shepley, R. 397.

<sup>2</sup> *Eager v. The Commonwealth, &c.*, 4 Mass. R. 182; *Layton v. State*, 4 Harr. R. 8; *Robertson v. Wurdeman*, 2 Hill, R. 324.

<sup>3</sup> *Helps v. Winterbottom*, 2 B. & Ad. R. 431; *Rhodes v. Smethurst*, 4 Mees. & Welsb. R. 42; *Freak v. Cranefeldt*, 3 Myl. & C. R. 499; *Shutford v. Borough*, Godb. R. 437; *Miller v. Miller*, 7 Pick. R. 133; *Codman v. Rogers*, 10 Pick. R. 112.

<sup>4</sup> *Picquet v. Curtis*, 1 Sumner, R. 478; *Wenman v. Mohawk Ins. Co.* 13 Wend. R. 267; *Rowe v. Young*, 2 Brod. & B. R. 165; s. c. 2 Bligh, R. 391.

<sup>5</sup> *Whitehead v. Walker*, 9 Mees. & Welsb. R. 506.

begins to run against a contract from the time of its actual breach, and not from the time when damage accrues from that breach.<sup>1</sup> Upon a note payable on demand, it begins to run from the day of its date;<sup>2</sup> where an exact term of credit is given, from the time when the credit expires;<sup>3</sup> if payable at sight, from the day of presentment and demand.<sup>4</sup> So, also, where the promise is conditional, the statute begins to run from the happening of such condition, whether notice be given of it or not.<sup>5</sup> Thus, where, upon a bill of exchange which was barred by the statute, a promise was made by the drawer to pay as soon as his circumstances should enable him so to do; and he should be called upon for that purpose; it was held, that a complete right of action accrued from the time of the drawer's actual ability to pay, although the other party had made no demand, and had not been informed by the defendant, or otherwise had knowledge of such ability; and that the bringing the action was a sufficient demand.<sup>6</sup>

§ 1011 *a.* Again, the statute begins to run from the time when the action can be brought therefor, and not from the time that the knowledge thereof comes to the party having au-

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<sup>1</sup> *Short v. M'Carthy*, 3 B. & Ald. R. 626; *Battley v. Faulkner*, 3 B. & Ald. R. 288; *Brown v. Howard*, 2 B. & Bing. R. 73; s. c. 4 *Moore*, R. 508; *Howell v. Young*, 8 D. & R. 14; s. c. 5 B. & C. R. 259.

<sup>2</sup> *Norton v. Ellam*, 2 M. & W. R. 461; *Little v. Blunt*, 9 Pick. R. 488; *Ruff v. Bull*, 7 Har. & J. R. 14; *Wenham v. The Mohawk Ins. Co.* 13 Wend. R. 267; *Hill v. Henry*, 17 Ohio R. 9.

<sup>3</sup> *Wittersheim v. Lady Carlisle*, 1 H. Black. R. 631; *Wheatley v. Williams*, 1 *Mees. & Welsb.* R. 533; *Irving v. Veitch*, 3 *Ibid.* 90; *Fryer v. Roe*, 22 Eng. Law & Eq. R. 440.

<sup>4</sup> *Wolfe v. Whiteman*, 4 Harrington, R. 246; *Holmes v. Kerrison*, 2 Taunt. R. 323.

<sup>5</sup> *Shetford v. Burrough*, Godb. R. 437; *Fenton v. Emblers*, 1 Wm. Black. R. 355; *Argall v. Bryant*, 1 Sandf. R. 98; *Governor v. Gordon*, 15 Ala. R. 72.

<sup>6</sup> *Waters v. Earl of Thanet*, 2 Adolph. & Ell. R. (N. S.) 757.

thority to bring it, or, in other words, it dates from the present right of action, not from the knowledge of the party.<sup>1</sup> Therefore, on an agreement to pay upon a certain condition, the statute attaches at the moment the condition occurs, whether such fact be known or not.<sup>2</sup> And in cases of breach of contract whereby injury results, the statute attaches at the moment of the breach of contract, and not when the injury actually results therefrom.<sup>3</sup> Ordinarily, where continuous labor and services are given and no time for their completion is fixed, the statute would commence when the labor and services are completed; but if a bill be rendered at any time and payment demanded, the statute would commence at the time of the presentment of the bill,<sup>4</sup> unless the contract were entire and the completion of it essential to a demand for any part of the price. But where the cause of action arises from the improper or imperfect execution of work and labor to be completed at a fixed time, the statute commences with the fixed time. Where a sum of money is to be paid by instalments, the statute attaches to each instalment as it becomes due; but if the agreement be that upon any one default, the whole sum after deducting the payments already made should become due, the statute would begin to run from the time of the default.<sup>5</sup>

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<sup>1</sup> *Waters v. The Earl of Thanet*, 2 Q. B. R. 757; *Battley v. Faulkner*, 3 Barn. & Ald. R. 288; *Short v. McCarthy*, 3 Ibid. 626; *Granger v. George*, 5 Barn. & Cres. R. 149; *Howell v. Young*, 5 Ibid. 259; *Brown v. Howard*, 2 Brod. & Bing. R. 73; *Troup v. Smith*, 20 Johns. R. 33; *Wilcox v. Plummer*, 4 Peters, R. 172; *Kerns v. Schoonmaker*, 4 Ohio R. 331.

<sup>2</sup> *Ibid. Shutford v. Burrough*, Godb. R. 437.

<sup>3</sup> *Sinclair v. The Bank of S. C.* 2 Stroh. R. 314; *Little v. Blunt*, 9 Pick. R. 488. See super, note 3, § 1011; *Argall v. Bryant*, 1 Sandf. R. 98; *Smith v. Fox*, 6 Hare, R. 386.

<sup>4</sup> *Vansandau v. Browne*, 9 Bing. R. 402; *Harris v. Osbourn*, 2 Cromp. & Mees. R. 629; *Nicholls v. Wilson*, 11 Mees. & Welsb. R. 106; *Whitehead v. Lord*, 11 Eng. Law & Eq. R. 587; *Phillips v. Broadley*, 9 Q. B. R. 744; *Foster v. Jack*, 4 Watts, R. 334; *Rothery v. Munnings*, 1 Barn. & Adolph. R. 15.

<sup>5</sup> *Hemp v. Garland*, 4 Adolph. & Ell. (n. s.) R. 519; *Help v. Winterbottom*, 2 Barn. & Adolph. R. 431; *Cooke v. Whorwood*, 2 Saun. R. 337.

§ 1012. This statute cannot be set up as a bar to an action at law, or in equity, by a defendant who has been guilty of fraud unknown by the plaintiff, at any time within the six years.<sup>1</sup> But it must not only be alleged and proved, that the right of action was unknown to the plaintiff but also that it was *fraudulently concealed* by the defendant from the knowledge of the plaintiff.<sup>2</sup> For if there be no evidence of fraud practised by the defendant in order to prevent the plaintiff from obtaining knowledge of that which had been done, mere want of knowledge would not take the case out of the statute.<sup>3</sup> After the lapse of six years from the discovery of the fraud, the statute would, however, apply.<sup>4</sup>

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<sup>1</sup> See *Sherwood v. Sutton*, 5 Mason, R. 146, containing an examination of all the leading cases. *Conyers v. Kenan*, 4 Geo. R. 308; *Persons v. Jones*, 12 Ibid. 371; *Booth v. Lord Warrington*, 4 Bro. Parl. Cas. 163; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. R. 607; *Western v. Cartwright*, Select Cases in Ch. 34; s. c. 2 Eq. Abr. 10, Pl. 11; *South Sea Co. v. Wymondsell*, 3 P. Wms. R. 143; *Bree v. Holbech*, Doug. R. 655; *Short v. McCarthy*, 3 B. & Ald. R. 626; *Clark v. Hougham*, 2 B. & C. R. 149. This doctrine is also supported by most of the American cases, and confirmed by Statute in Massachusetts, Rev. Stat. ch. 120, § 12; *Homer v. Fish*, 1 Pick. R. 435; *Welles v. Fish*, 3 Ibid. 74. So, also, the same doctrine is held in Maine, upon proof of actual parol. *Cole v. M'Glashery*, 9 Greenl. R. 131; *Bishop v. Little*, 3 Ibid. 405. In New York, however, the rule only applies in equity and not in law. *Troup v. Smith*, 20 Johns. R. 33; *Oothout v. Thompson*, Ibid. 277. So, also, in South Carolina and Virginia, the same rule is held as that in New York. *Miles v. Berry*, 1 Hill, (S. C.) R. 296; *Hamilton v. Shepperd*, 3 Murph. R. 115; *Callis v. Waddy*, 2 Munf. R. 511. Such is the rule in Vermont; *Smith v. Bishop*, 9 Verm. R. 110; in Ohio, *Fee v. Fee*, 10 Ohio R. 469. In England, Imperial Gas Light Co. v. London Gas Light Co. 26 Eng. Law & Eq. R. 425, and Bennett's note. In Texas, *Lewis v. Houston*, 11 Texas R. 642. The better founded opinion, both in principle and equity, however, seems to be that stated in the text.

<sup>2</sup> *Sherwood v. Sutton*, 5 Mason, R. 7, 150, and cases therein commented on.

<sup>3</sup> *Granger v. George*, 5 Barn. & Cres. R. 149; *Clark v. Hougham*, 2 Ibid. 149; *Mass. Turnpike Corporation v. Field*, 3 Mass. R. 201; *Welles v. Fish*, 3 Pick. R. 74; *Bishop v. Little*, 3 Greenl. R. 405; *Sherwood v. Sutton*, 5 Mason, R. 146.

<sup>4</sup> *Brooksbank v. Smith*, 2 Y. & Coll. R. 58; 2 Story, Eq. Jurisp. § 1521 a,

§ 1013. The operation of this statute may, also, be frustrated by an acknowledgment of the existence of the debt, or by a new promise to pay it. This promise or acknowledgment is considered as a new promise, founded upon the previous debt as a consideration, and must be sufficient in itself to support an action for the debt independent of the original promise.<sup>1</sup> The acknowledgment is to be considered not as a revival of the original agreement, but as a new and distinct agreement in itself.

§ 1014. A taint of dishonor was formerly considered to attach to a party offering the statute of limitations as a defense to his liability in a contract; and the courts held that any acknowledgment of the debt, however slight, was sufficient to take the case out of the statute.<sup>2</sup> But in the later decisions a different view has been taken of the statute, and the construction of it has been far more liberal and favorable.<sup>3</sup>

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note ; Farnam *v.* Brooks, 9 Pick. R. 212; Cole *v.* M'Glathry, 9 Greenl. R. 131; Homer *v.* Fish, 1 Pick. R. 435; Battley *v.* Faulkner, 3 B. & Ald. R. 288; Hovenden *v.* Lord Annesley, 2 Sch. & Lef. R. 634; Granger *v.* George, 5 B. & C. R. 149 ; Sherwood *v.* Sutton, 5 Mason, R. 1 ; s. c. Ibid. 143.

<sup>1</sup> See Bell *v.* Morrison, 1 Peters, R. 360, and other cases there cited ; Hart *v.* Prendergast, 14 M. & W. R. 741 ; Smith *v.* Thorn, 10 Eng. Law & Eq. R. 391 ; Cawley *v.* Furnell, 12 C. B. R. 291 ; Williams *v.* Griffith, 3 Excheq. R. 335.

<sup>2</sup> Lord Mansfield, in Trueman *v.* Fenton, Cowp. R. 548 ; Richardson *v.* Fen, Loft, R. 86 ; Lloyd *v.* Maund, 2 T. R. 760 ; Bryan *v.* Horseman, 4 East, R. 599 ; Leaper *v.* Tatton, 16 Ibid. 420 ; Clark *v.* Hougham, 2 Barn. & Cres. R. 154 ; Mount Stephen *v.* Brooke, 3 Barn. & Ald. R. 141. According to these cases the mere acknowledgment that the debt is unpaid is sufficient to take the case out of the statute, even though there be a direct refusal to pay it. So that it has been said, in allusion to these decisions, that if a man present a bill barred by the statute of limitations, the only course left to the party charged, is to keep perfect silence, and kick the other down stairs.

<sup>3</sup> In Bell *v.* Morrison, 1 Peters, R. 360, Mr. Justice Story says : " It has often been matter of regret in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute ; that instead of

It is now well established, that if there be no express promise to pay, a promise will not be raised by implication of law,

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being viewed in an unfavorable light, as an unjust and discreditable defence, it had received such support as would have made it what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of the witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions, (a species of evidence which, it has been often observed, it is hard to disprove and easy to fabricate,) applicable to such remote times, as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further, and admit that loose and general expressions, from which a probable or possible inference may be deduced of the acknowledgment of a debt, by a court or jury; that, as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt; that any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and to let in evidence *aliunde* to establish any debt, however large, and at whatever distance of time; it is easy to perceive that the wholesome objects of the statute must be in a great measure defective; and the statute virtually repealed.

"The English decisions upon this subject have gone great lengths; greater, indeed, in our judgment, than any sound interpretation of the statute will warrant; and in some instances to an extent which is irreconcilable with any just principle. There appears, at present, a disposition on the part of the English courts to retrace their steps; and, as far as they may, to bring back the doctrine to sober and rational limits. The American courts have evinced a like disposition. In the recent case of *Bangs v. Hall*, 2 Pick. R. 368, the principal cases were reviewed by the Supreme Court of Massachusetts; and it was held, that to take a case out of the statute there must be an unqualified acknowledgment, not only of the debt as originally due, but that it continues so; and, if there has been a conditional promise, that the condition has been performed. A doctrine quite as comprehensive has been asserted in the Supreme Court of New York. The subject was much considered in the case of *Sands v. Gelston*, 15 Johns. R. 511, where Mr. Chief Justice Spencer, in delivering the opinion of the court, said: 'That if at the time of the acknowl-

from the acknowledgment of the party, unless there be an unqualified admission of the debt, and also an unconditional expression of willingness to pay it.<sup>1</sup> An acknowledgment,

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edgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, it will not be evidence of a promise sufficient to revive the debt, and take it out of the statute.' In consonance with this principle the same court has held, that 'if the acknowledgment be accompanied with a declaration that the party intends to rely on the statute as a defence, such an acknowledgment is wholly insufficient.' See, also, *Brown v. Campbell*, 1 Serg. & Rawle, R. 176; *Fries v. Boiselet*, 9 Ibid. 128." See, also, *Clementson v. Williams*, 8 Cranch, R. 72; *Tanner v. Smart*, 6 Barn. & Cres. R. 603; *A'Court v. Cross*, 3 Bing. R. 329; *Ayton v. Bolt*, 4 Ibid. 105; *Hart v. Prendergast*, 14 Mees. & Welsb. R. 741; *Williams v. Griffith*, 3 Excheq. R. 335; *Routledge v. Ramsay*, 8 Adolph. & Ell. R. 221; *Cory v. Bretton*, 4 Car. & Payne, R. 462.

<sup>1</sup> *Tanner v. Smart*, 6 Barn. & Cres. R. 603. Mr. Baron Parke, speaking of this case in *Hart v. Prendergast*, 14 Mees. & Welsb. R. 741, says: "There is no doubt of the principle of law applicable to these cases, since the decision in *Tanner v. Smart*, namely, that the plaintiff must either show an unqualified acknowledgment of the debt, or, if he show a promise to pay coupled with a condition, he must show performance of the condition; so as in either case to fit the promise laid in the declaration, which is a promise to pay on request. The case of *Tanner v. Smart* put an end to a series of decisions which were a disgrace to the law, and I trust we shall be in no danger of falling into the same course again." See, also, *Smith v. Thorn*, 10 Eng. Law & Eq. R. 391; *Gilkynson v. Larue*, 6 Watts & Serg. R. 213; *Gillingham v. Gillingham*, 17 Penn. St. R. 303; *Sherman v. Wakeman*, 11 Barb. R. 254; *Butterfield v. Jacobs*, 15 N. Hamp. R. 140; *Moore v. Bank of Columbia*, 6 Peters, R. 93; *Wetzell v. Bussard*, 11 Wheat. R. 309; *Read v. Wilkinson*, 2 Wash. C. C. R. 514; *Clementson v. Williams*, 8 Cranch, R. 72; *Whitney v. Bigelow*, 4 Pick. R. 110; *Hill v. Kendall*, 25 Vermont R. 528; *Tompkins v. Brown*, 1 Denio, R. 247; 2 Stark. Evid. (8th Am. ed.) 479, note, and numerous cases as there cited. In *Bell v. Morrison*, 1 Peters, R. 360, Mr. Justice Story thus clearly states the rule: "In the case of *Wetzell v. Bussard*, 11 Wheat. R. 309, the subject again came before this court; and the English and American authorities were deliberately examined. The court there expressly held, that 'an acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show, positively, that the debt is due, in whole or in part. If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new assumpsit, for which the old debt is a sufficient consideration; or, if it be construed to

therefore, of the original justice of a claim, is not sufficient to take the case out of the statute, unless accompanied with an admission of the party's present liability.<sup>1</sup> If the terms in which the acknowledgment is given be equivocal or indeterminate, so that they might impress different minds in different ways; or if there be circumstances, which tend to create or repel the presumption of an intention to renew the promise; it should be left to a jury to say, whether there were such an acknowledgment as is legally necessary.<sup>2</sup> It is not necessary, however, that any specific sum should be acknowledged to be

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revive the original debt, the revival is conditional, and the performance of the condition or a readiness to perform it must be shown.'

"We adhere to the doctrine thus stated, and think it the only exposition of the statute which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed.

"If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay.

"If there be accompanying circumstances which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by perjuries." See, also, *Bell v. Rowland's Administrators*, Hardin, R. 301; *Harrison v. Handley*, 1 Bibb, R. 443.

<sup>1</sup> *Clementson v. Williams*, 8 Cranch, R. 72; *Tanner v. Smart*, 6 B. & C. R. 609; *A'Court v. Cross*, 3 Bing. R. 329.

<sup>2</sup> *Bell v. Morrison*, 1 Peters, (S. C.) R. 362; *Bangs v. Hall*, 2 Pick. R. 368; *Sumner v. Sumner*, 1 Metcalf, R. 394; *Alcock v. Ewen*, 2 Hill, S. C. R. 326; *Humphreys v. Jones*, 14 Mees. & Welsb. R. 1; 2 *Greenleaf on Evid.* § 440; *Perley v. Little*, 3 Greenl. R. 97; *Stanton v. Stanton*, 2 N. Hamp. R. 426; *A'Court v. Cross*, 3 Bing. R. 329.

due,<sup>1</sup> if the acknowledgment be sufficiently broad to include the debt, and sufficiently particular to show that it was the subject-matter of the acknowledgment.<sup>2</sup> But if only one debt is proved to exist, the acknowledgment will be presumed to refer to that.<sup>3</sup>

§ 1015. The acknowledgment or promise must be by a party fully authorized to make it at the time it is made, or it will not avail as against the party from whom the debt is due. Whether where there is a privity of parties, an acknowledgment and new promise by one is sufficient to revive the debt as to all, is very questionable. In some cases it has been held, that if an acknowledgment and promise be made by a principal debtor, it binds his surety;<sup>4</sup> if by one of several joint debtors, it binds all;<sup>5</sup> if by a guardian, it binds the ward;<sup>6</sup> and if by one partner, it binds all.<sup>7</sup> But this doctrine has been strenuously denied, and with great cogency of reasoning, and the whole tendency of the modern decisions upon the statute would seem to be against the validity of such a promise in

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<sup>1</sup> *Dinsmore v. Dinsmore*, 21 Maine R. 433; *Davis v. Steiner*, 14 Penn. St. R. 275; *Williams v. Griffith*, 3 Excheq. R. 335; *Gardner v. McMahon*, 3 Q. B. R. 561.

<sup>2</sup> *Barnard v. Bartholomew*, 22 Pick. R. 291; *Ilsley v. Jewett*, 2 Metcalf, R. 168; *Arey v. Stephenson*, 11 Ired. R. 86; *Martin v. Broach*, 6 Geo. R. 21.

<sup>3</sup> *Guy v. Tams*, 6 Gill, R. 82; *Woodbridge v. Allen*, 12 Metcalf, R. 470.

<sup>4</sup> *Frye v. Barker*, 4 Pick. R. 382.

<sup>5</sup> *Patterson v. Choate*, 7 Wend. R. 441; 1 Greenleaf on Evid. § 174, 176; *Goddard v. Ingram*, 3 Q. B. R. 839.

<sup>6</sup> *Manson v. Felton*, 13 Pick. R. 206.

<sup>7</sup> *Wood v. Braddick*, 1 Taunt. R. 104; *Walton v. Robinson*, 5 Ired. R. 341; *Wheelock v. Doolittle*, 3 Washburn, R. 440. But see *Clark v. Alexander*, 8 Scott, N. R. 147. As to Executors, *quære*. *Scholey v. Walton*, 12 Mees. & Welsb. R. 510; *Foster v. Starkie*, Sup. Jud. Court, Mass. Oct. 7, 1853; *Baxter v. Penniman*, 8 Mass. R. 133; *Emerson v. Thompson*, 16 Ibid. 429, that executors or administrators have the power to revive the liability of the estate by their acknowledgment. But see *Peck v. Boloford*, 7 Conn. R. 176; *Tullock v. Dunn*, Ry. & Mood. R. 416; *Oakes v. Mitchell*, 3 Shepley, R. 360; *Forney v. Benedict*, 5 Barr, R. 225; *Sanders v. Robertson*, 23 Miss. R. 389.

respect to any one except the party promising.<sup>1</sup> The acknowl-

<sup>1</sup> This doctrine has been strenuously asserted by the Supreme Court of the United States in the case of *Bell v. Morrison*, 1 Peters, R. 371, Mr. Justice Story delivering the judgment of the court. He says: "It still remains for us to consider whether the acknowledgment of one partner, after the dissolution of the copartnership, is sufficient to take the case out of the statute as to all the partners. How far it may bind the partner making the acknowledgment to pay the debt, need not be inquired into; to maintain the present action, it must be binding upon all.

"In the case of *Bland v. Haselrig*, 2 Vent. R. 151, where the action was against four, upon a joint promise, and the plea of the statute of limitations was put in, and the jury found that one of the defendants did promise within six years, and that the others did not; three judges against Ventris, J., held that the plaintiff could not have judgment against the defendant who had made the promise. This case has been explained upon the ground that the verdict did not conform to the pleadings, and establish a joint promise. It is very doubtful upon a critical examination of the report, whether the opinion of the court, or of any of the judges, proceeded solely upon such a ground.

"In *Whitcomb v. Whiting*, 2 Doug. R. 652, decided in 1781, in an action on a joint and several note brought against one of the makers, it was held that proof of payment, by one of the others, of interest on the note and part of the principal, within six years, took the case out of the statute, as against the defendant who was sued. Lord Mansfield said: 'Payment for one is payment for all, the one acting virtually for all the rest; and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due. This is the whole reasoning reported in the case, and is certainly not very satisfactory. It assumes that one party who has authority to discharge, has, necessarily, also authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now this very position constitutes the matter in controversy. It is true that a payment by one does enure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt; if such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them in contribution without such payment has been rightfully made and ought to charge them.'

"When the statute has run against a joint debt, the reasonable presumption

edgment and promise which is sufficient to bar the statute must, as we have seen, be express and unequivocal, and it operates

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is, that it is no longer a subsisting debt; and, therefore, there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But, if this were not so, still there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all. The one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable; and yet refuse to authorize a charge where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt at the time when such acknowledgment was made.

"The doctrine of *Whitcomb v. Whiting* has been followed in England in subsequent cases, and was applied in a strong manner in *Jackson v. Fairbank*, 2 H. Bl. R. 340, where the admission of a creditor to prove a debt on a joint and several note under a bankruptcy, and to receive a dividend, was held sufficient to charge a solvent joint debtor, in a several action against him, in which he pleaded the statute as an acknowledgment of a subsisting debt. It has not, however, been received without hesitation. In *Clarke v. Bradshaw*, 3 Esp. R. 155, Lord Kenyon, at *Nisi Prius*, expressed some doubts upon it; and the cause went off on another ground. And in *Brandram v. Wharton*, 1 Barn. & Ald. R. 463, the case was very much shaken, if not overturned. Lord Ellenborough, upon that occasion, used language from which his dissatisfaction with the whole doctrine may be clearly inferred. 'This doctrine,' says he, 'of rebutting the statute of limitations by an acknowledgment other than that of the party himself, begun with the case of *Whitcomb v. Whiting*. By that decision, where, however, there was an express acknowledgment by an actual payment of a part of the debt by one of the parties, I am bound. But that case was full of hardship; for this inconvenience may follow from it. Suppose a person liable jointly with thirty or forty others to a debt, he may have actually paid it, may have had in possession the document by which that payment was proved, but may have lost his receipt. Then, though this was one of the very cases which this statute was passed to protect, he may still be bound, and his liability be renewed, by a random acknowledgment made by some one of the thirty or forty others who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive a party of the advantage given him by the statute by means of an implied acknowledgment.' The English cases decided since the American Revolution are, by an express statute of Kentucky, declared not to be of authority in their courts, and, con-

not so much to revive the original promise as to create a new one, founded upon the former as a consideration.<sup>1</sup> If this be

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sequently, Whitcomb *v.* Whiting in Douglas, and the cases which have followed it, leave the question in Kentucky quite open to be decided upon principle.

"In the American courts, so far as our researches have extended, few cases have been litigated upon this question. In Smith's *Adm. v. D. & G. Ludlow*, 6 Johns. R. 267, the suit was brought against both partners, and one of them pleaded the statute. Upon the dissolution of partnership, public notice was given that the other partner was authorized to adjust all accounts, and an account signed by him after such advertisement and within six years, was introduced. It was also proved that the plaintiff called on the partner who pleaded the statute before the commencement of the suit, and requested a settlement; and that he then admitted an account, dated in 1797, to have been made out by him; that he thought the account had been settled by the other defendant, in whose hands the books of the partnership were, and that he would see the other defendant on the subject, and communicate the result to the plaintiff. The court held that this was sufficient to take the case out of the statute, and said that without any express authority, the confession of one partner after the dissolution will take a debt out of the statute. The acknowledgment will not, of itself, be evidence of an original debt; for that would enable one party to bind the other in new contracts. But the original debt being proved or admitted, the confession of one will bind the other, so as to prevent him from availing himself of the statute. This is evident from the cases of *Whitcomb v. Whiting*, and *Jackson v. Fairbank*; and it results, necessarily, from the power given to adjust accounts. The court also thought the acknowledgment of the partner setting up the statute was sufficient of itself to sustain the action. This case has the peculiarity of an acknowledgment made by both partners, and a formal acknowledgment by the partner who was authorized to adjust the accounts after the dissolution of the partnership. There was not, therefore, a virtual, but an express and notorious agency, devolved on him to settle the account. The correctness of the decision cannot, upon the general view taken by the court, be questioned. In *Roosevelt v. Mark*, 6 Johns. Ch. R. 266,

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<sup>1</sup> In *Boydell v. Drummond*, 2 Camp. R. 157, Lord Ellenborough says: "If a man acknowledges the existence of a debt barred by the statute, the law has been supposed to raise a *new promise* to pay it and *thus* the remedy is revived." So, also, in *Jones v. Moore*, 5 Binn. R. 573, Mr. Chief Justice Tilghman, after an elaborate review of all the cases, says: "I cannot comprehend the meaning of reviving the old debt in any other manner than by a new promise." See, also, *Huckley v. Patrick*, 3 Johns. R. 536; *Walker v. Duberry*, 1 A. K. Marsh. R. 189, and cases before cited; *Patterson v. Choate*, 7 Wend. R. 441.

so, how can one of several joint debtors make a new promise, upon a debt extinguished by the statute, without authority so

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291, Mr. Chancellor Kent admitted the authority of *Whitcomb v. Whiting*, but denied that of *Jackson v. Fairbank*, for reasons which appear to us solid and satisfactory. Upon some other cases in New York we shall have occasion hereafter to comment. In *Hunt v. Bridgham*, 2 Pick. R. 581, the Supreme Court of Massachusetts, upon the authority of the cases in Douglas, II. Blackstone, and Johnson, held that a partial payment by the principal debtor on a note, took the case out of the statute of limitations, as against a surety. The court do not proceed to any reasoning to establish the principle, considering it as the result of the authorities. *Shelton v. Cocke*, 3 Mumf. R. 191, is to the same effect, and contains a mere annunciation of the rule, without any discussion of its principle. *Simpson v. Geddes*, 2 Bay, R. 533, proceeded on a broader ground, and assumes the doctrine of the case in 1 *Taunt*. R. 104, hereinafter noticed, to be correct. Whatever may be the just influence of such recognitions of the principles of the English cases in other States, as the doctrine is not so settled in Kentucky, we must resort to such recognition only as furnishing illustrations to assist our reasoning, and decide the case now as if it had never been decided before.

" By the general law of partnership, the act of each partner, during the continuance of the partnership, and within the scope of its objects, binds all the others. It is considered the act of each and of all, resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership by his contracts in the partnership business, but he cannot bind it by any contracts beyond those limits. A dissolution, however, puts an end to the authority. By the force of its terms it operates as a revocation of all power to create new contracts, and the right of partners as such can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this right may be qualified and restrained by the express delegation of the whole authority to one of the partners.

" The question is not, however, as to the authority of a partner after the dissolution to adjust an admitted and subsisting debt; we mean admitted by the whole partnership, or unbarred by the statute; but whether he can by his sole act, after the action is barred by lapse of time, revive it against all the partners, without any new authority communicated to him for this purpose. We think the proper resolution of this point depends upon another, that is, whether the acknowledgment or promise is to be deemed a mere continuation of the original promise, or a new contract springing out of, and supported by, the original consideration. We think it is the latter, both upon principle and authority; and if so, as after the dissolution no one partner can create a new

to do from his co-debtors? If express authority be shown, the new promise would be binding on all, but without such author-

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contract binding upon the others; his acknowledgment is inoperative and void as to them." See, also, *Hackley v. Patrick*, 3 Johns. R. 536; *Walden v. Sherburne*, 15 Ibid. 409. The same view has been followed in *Van Keuren v. Parmelee*, 2 Comst. R. 523; and in *Shoemaker v. Benedict*, 1 Ker. R. 176, the Court of Appeals of New York held that payments by one of several joint and several promisors did not affect the right of the other promisors to plead the statute, although payment took place before the debt was barred by the statute. In New Hampshire the same rule has been held in *Exeter Bank v. Sullivan*, 6 N. Hamp. R. 124; *Kelley v. Sandborn*, 9 Ibid. 46; *Whipple v. Stevens*, 2 Foster, R. 219. And in Tennessee in *Belote v. Wynne*, 7 Yerg. R. 534; *Muse v. Donelson*, 2 Humph. R. 166. But in England the rule, as laid down in *Whitcomb v. Whiting*, 2 Doug. R. 652, that an acknowledgment or new promise or part payment by one of several joint debtors takes the debt out of the statute as to all, has, with few exceptions, been constantly held. See *Perham v. Raynal*, 2 Bing. R. 306; *Wyatt v. Hodson*, 8 Ibid. 309; *Manderston v. Robertson*, 4 Man. & Ryl. R. 440; *Burleigh v. Stott*, 8 Barn. & Cres. R. 36; *Pease v. Hirst*, 10 Ibid. 122; *Channell v. Ditchburn*, 5 Mees. & Welsb. R. 494. But in *Brandram v. Wharton*, 1 Barn. & Ald. R. 463, and *Atkins v. Tredgold*, 2 Barn. & Cres. R. 23, the decision of *Whitcomb v. Whiting* was doubted; and in *Channell v. Ditchburn*, Mr. Baron Parke, in speaking of these cases, says: "After those two cases, undoubtedly some degree of doubt might fairly exist as to the propriety of the decision in the case of *Whitcomb v. Whiting*; and it does seem a strange thing to say, that where a person has entered into a joint and several promissory note with another person, he thereby makes that other his agent, with authority, by acknowledgment or payment of interest, to enter into a new contract for him. But since the decisions in *Atkins v. Tredgold* and *Slater v. Lawson*, the Court of King's Bench have twice decided that payment by one or two joint makers of a promissory note is sufficient to take the case out of the statute as against the other. The first of these cases was that of *Burleigh v. Stott*, where the defendant was sued as the joint and several maker of a promissory note, and there the court held, that payment of interest by the other joint maker was enough to take the case out of the statute as against the defendant; and that it was to be considered as a promise by both, so as to make both liable. And since the decision in that case, the Court of King's Bench have come to the same conclusion in the case of *Manderston v. Robertson*, 4 Man. & Ryl. R. 440, which was argued on the 22d of May, 1829. I have discovered my paper book in that case, which, it appears, was argued by Mr. Platt himself; and the court decided there, that an account stated by one of the makers of a joint

ization it is difficult to see why it should have such effect. It has clearly been held, that after the dissolution of partnership, an acknowledgment by one partner would not be binding upon his co-partners;<sup>1</sup> and it would seem, upon principle, that the same rule should apply during the existence of the partnership. Again, the manifest inconvenience resulting from the doctrine that one joint promisor could, by his single promise, render all his co-promisors liable on a debt barred by the statute, has led, in England, to the passage of an act of parliament, called Lord Tenterden's Act, by which it is declared,

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note, and part payment of the account, took the case out of the statute as to the other, thus confirming the authority of *Burleigh v. Stott*. Then Mr. Platt relies upon the distinction in this case, that the payment was made after the statute had run, and which was pointed out by Mr. Justice Bayley as one of the grounds on which he distinguished the case of *Atkins v. Tredgold* from *Whitcomb v. Whiting*; that there the statute had attached, and that its operation could not be affected by any act of future payment. But I find that in *Mandertson v. Robertson* the note was dated the 9th of July, 1817, and an account was furnished by one of the joint makers, on the first of June, 1825, to the payee, taking credit to himself for payments of interests after the six years had elapsed, but not before; and it was held, that this was sufficient to take the case out of the statute as against the other maker. There the payment was after the six years had elapsed, and yet it was held sufficient. The result is, that we must consider the case of *Whitcomb v. Whiting* as good law."

The doctrine of *Whitcomb v. Whiting* has also obtained in Massachusetts, at least to a certain extent. See *Hunt v. Bridgham*, 2 Pick. R. 581; *White v. Hale*, 3 Ibid. 291; *Frye v. Barker*, 4 Ibid. 382; and *Sigourney v. Drury*, 14 Ibid. 387, in which the question is elaborately discussed, and the doctrine restricted to cases of payment by one joint promisor, and not extending to mere promises. Also, in Maine, see *Getchell v. Heald*, 7 Greenl. R. 26; *Pike v. Warren*, 15 Maine R. 390; *Shepley v. Waterhouse*, 22 Ibid. 497. But the inconvenience resulting from this rule has led, in England, in Massachusetts, and in Maine, to a statute provision by which it is clearly overruled, and it is required that a debt barred by the statute can only be revived against joint promisors by the express promise of each, plainly showing that the objects of the original statute were frustrated by the decisions of the court.

<sup>1</sup> *Van Keuren v. Parmelee*, 2 Comst. R. 523; *Levy v. Cadet*, 17 Serg. & Rawle, R. 126; *Bell v. Morrison*, 1 Peters, R. 351; *Hackley v. Patrick*, 3 Johns. R. 536; *Walker v. Duberry*, 1 A. K. Marsh. R. 189.

that where there are "two or more joint contractors or executors or administrators of any joint contractors, no such joint contractor, executors, or administrators, shall lose the benefit of the said enactments [the statute of limitations] or either of them, so as to be chargeable in respect or by reason of any acknowledgment or promise by any other or others of them."<sup>1</sup> This statute may, therefore, be considered as a declaration of the final opinion in England, upon the question of what should constitute an acknowledgment. Similar statutes have also been passed in Massachusetts and Maine.<sup>2</sup>

§ 1015 a. No form of words is, however, necessary to create an acknowledgment, nor need it be made in writing, unless it be required to be so made by some statute provision, even although the original contract were required by the statute of frauds to be in writing.<sup>3</sup> It has even been held, that it may arise by implication from facts alone,<sup>4</sup> but this is very doubtful at least.<sup>5</sup> So, also, it has been held not to be necessary that it should be made directly to the party to whom the debt is due; but that it will be sufficient if made to a stranger;<sup>6</sup> but it is questionable whether this doctrine would be now supported. Under the provisions of Lord Tenterden's Act, it has been considered necessary that the acknowledgment should be to the creditor himself, and that it would not be sufficient if made to a mere stranger.<sup>7</sup> And, although the older cases before

<sup>1</sup> Statute of Geo. IV. ch. 14.

<sup>2</sup> Mass. Rev. Stat. ch. 120, § 18; Maine Rev. Stat. ch. 146, § 29.

<sup>3</sup> Gibbons v. McCasland, 1 Barn. & Ald. R. 690.

<sup>4</sup> Whitney v. Bigelow, 4 Pick. R. 110; East Ind. Co. v. Prince, Ryan & Mood. R. 407.

<sup>5</sup> See Bell v. Morrison, 1 Peters, R. 355, and cases cited and commented on by the court.

<sup>6</sup> Halliday v. Ward, 3 Camp. R. 32; Mount Stephen v. Brooke, 3 Barn. & Ald. R. 141; Sluby v. Champlin, 4 Johns. R. 461; Bloodgood v. Bruen, 4 Sandf. R. 427; Watkins v. Stevens, 4 Barb. R. 168. Contra, in Pennsylvania, Kyle v. Wells, 17 Penn. St. R. 286; Morgan v. Walton, 4 Barr, R. 323.

<sup>7</sup> Grenfell v. Girdlestone, 2 Younge & Coll. R. 662.

the passage of this Act are clearly to the opposite effect,<sup>1</sup> yet the tendency of the modern decisions to require a stricter form of acknowledgment, taken in conjunction with this Act in England, and similar ones passed in America, indicate, perhaps, that an acknowledgment to a mere stranger would not now be considered sufficient in this country — especially as the authorities are conflicting.<sup>2</sup> But an acknowledgment to an agent or person fully authorized and representing the creditor, would, it should seem, on principle, be amply sufficient.<sup>3</sup> Whether it would be, if made by the maker to the payee of a bill or note held by a subsequent party, is doubtful.<sup>4</sup>

§ 1015 b. Whether part payment or payment of interest by one of joint promisors would create a new promise by implication so as to bind all, is also a question of much difficulty. Upon principle, it is difficult to see why a partial payment or a payment of interest should have a different effect from an express promise, the question apparently being one of agency in both cases, and depending upon the authority of the one joint

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<sup>1</sup> Mount Stephen *v.* Brooke, 3 Barn. & Ald. R. 141; Peters *v.* Brown, 4 Esp. R. 46; Clark *v.* Hougham, 2 Barn. & Cres. R. 149; Soulden *v.* Van Rensselaer, 9 Wend. R. 293; Whitney *v.* Bigelow, 4 Pick. R. 110; Watkins *v.* Stevens, 4 Barb. R. 168; Bloodgood *v.* Bruen, 4 Sandf. R. 427; Carshore *v.* Huyck, 6 Barb. R. 583; St. John *v.* Garrow, 4 Porter, R. 223; Oliver *v.* Gray, 1 Har. & Gill, R. 204.

<sup>2</sup> In Pennsylvania the promise must be to the creditor. Farmers & Mechanics Bank *v.* Wilson, 10 Watts, R. 261; Morgan *v.* Walton, 4 Penn. St. R. 323; Christy *v.* Flemington, 10 Ibid. 129; Kyle *v.* Wells, 17 Ibid. 286; Gillingham *v.* Gillingham, Ibid. 302; Morgan *v.* Walton, 4 Barr, R. 323. See, also, as to the effect of an acknowledgment by the maker to the payee of negotiable paper held by a subsequent party, Gale *v.* Capern, 1 Adolph. & Ell. R. 102; Cripps *v.* Davis, 12 Mees. & Welsb. R. 159; Dean *v.* Hewit, 5 Wend. R. 257; Little *v.* Blunt, 9 Pick. R. 488; Bird *v.* Adams, 7 Geo. R. 505; Howe *v.* Thompson, 2 Fairf. R. 152.

<sup>3</sup> Megginson *v.* Harper, 2 Cromp. & Mees. R. 322; Hill *v.* Kendall, 25 Verm. R. 528. See, as to administrators, Baxter *v.* Penniman, 8 Mass. R. 133; Jones *v.* Moore, 5 Binn. R. 573.

<sup>4</sup> See above, note 2.

debtor to bind his co-debtors. But the distinction has been clearly taken, and even since the passage of Lord Tenterden's Act the weight of authority is certainly to the effect that a part payment or payment of interest by one is sufficient to render all liable, although by that Act a mere acknowledgment or promise would not have such an effect.<sup>1</sup>

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<sup>1</sup> *Dowling v. Ford*, 11 Mees. & Welsb. R. 329; *Goddard v. Ingram*, 3 Q. B. R. 839; *Wyatt v. Hodson*, 8 Bing. R. 309; *Manderston v. Robertson*, 4 Man. & Ryl. R. 440; *Channell v. Ditchburn*, 5 Mees. & Welsb. R. 494; *Pease v. Hirst*, 10 Barn. & Cres. R. 122; *Baldwin v. Clark*, cited 14 Pick. R. 387. These cases are since the Statute of 9 Geo. IV. ch. 14. See, also, *Burleigh v. Stott*, 8 Barn. & Cres. R. 36; *Sigourney v. Drury*, 14 Pick. R. 387; *Joslyn v. Smith*, 13 Verm. R. 353; *Bogert v. Vermilya*, 10 Barb. R. 32; *Dunham v. Dodge*, Ibid. 566; *Reid v. McNaughton*, 15 Ibid. 168. In *Van Keuren v. Parmelee*, 2 Comst. R. 523, it was held that a promise or acknowledgment by one partner, after dissolution of the firm, would not revive against his copartners, a debt barred by the statute. And in *Shoemaker v. Benedict*, 1 Ker. R. 106, the question came up, whether the same rule applied to payments by one partner; it was held that it did. Allen, J., after examining the case of *Van Keuren v. Parmelee*, said: "Do the points, in which this case differs from that decided by the court of appeals, take it without the principles decided and without the statute of limitations? I think not."

"First. One point of difference is, that in this case partial payments, and not a promise or naked acknowledgment of the existence of the debt, are relied upon to take the case out of the statute. But partial payments are only available as facts from which an admission of the existence of the entire debt and a present liability to pay, may be inferred. As a fact by itself, a payment only proves the existence of the debt, to the amount paid; but from that fact courts and juries have inferred a promise to pay the residue. In some cases it is said to be an unequivocal admission of the existence of the debt; and in the case of the payment of money as interest, it would be such an admission in respect to the principal sum. Again, it is said to be a more reliable circumstance than a naked promise, and the reason assigned is that it is a deliberate act, less liable to misconstruction and misstatement than a verbal acknowledgment. So be it. It is, nevertheless, only reliable as evidence of a promise, or from which a promise may be implied. Any other evidence which establishes such promise would be equally efficacious, and most assuredly a deliberate written acknowledgment of the existence of a debt and promise to pay, is of as high a character as evidence of a partial payment to defeat the statute of limitations. In either case the question is as to the weight to be given to evidence, and if a new promise is satisfactorily proved in either method, the

§ 1015 c. It seems not to be material whether the new promise, or the payment of interest, or part payment, be made before the statute of limitations attaches to the debt or after such time. In both cases the operation would be the same in respect to joint debtors, for the statute is said not to operate upon the debt but only upon the remedy; and if the promise or payment by all joint promisors would not revive the debt against his co-promisors, when made after the statute attaches, it would not, though made before the statute attached.<sup>1</sup>

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debt is renewed; and without a promise express or implied, it is not renewed. The question still recurs, who is authorized to make such promise? If one joint debtor could bind his co-debtors to a new contract by implication, as by a payment of a part of a debt for which they were jointly liable, he could do it directly by an express contract. The law will hardly be charged with the inconsistency of authorizing that to be done indirectly which cannot be done directly. If one debtor could bind his co-debtors by an unconditional promise, he could, by a conditional promise; and a man might find himself a party to a contract to the condition of which he would be a stranger." See, also, *Bell v. Morrison*, 1 Peters, R. 368; *Exeter Bank v. Sullivan*, 6 N. Hamp. R. 124; *Kelley v. Sandborn*, 9 Ibid. 46; *Whipple v. Stevens*, 2 Foster, R. 219; *Belote v. Wynne*, 7 Yerg. R. 534.

<sup>1</sup> *Shoemaker v. Benedict*, 1 Kernan, R. 176. In this case Allen, J., said: "Another fact relied upon to distinguish this case from *Van Keuren v. Parmelee* is, that the payments were made before the statute of limitations had attached to the debt, and while the liability of all confessedly existed. In some cases in Massachusetts, this, as well as the fact that the revival or continuance of the debt was effected by payments from which a promise was implied rather than by express promises, were commented upon by the court as important points. But I do not understand that the cases were decided upon the ground that those circumstances really introduced a new element or brought the cases within a different principle. The decisions, in truth, were based upon the authority of the decisions of the English courts, and prior decisions in the courts of that State. That a promise made while the statute of limitations is running, is to be construed and acted upon in the same manner as if made after the statute has attached, is decided in *Dean v. Hewit*, and *Tompkins v. Gardner*. If the promise is conditional, the condition must be performed before the liability attaches so as to authorize an action. It does not, as a recognition of the existence of the debt, revive it absolutely from the time of the conditional promise. And in principle, I see not why a promise made before the statute has attached to a debt should be obligatory

when made by one of several joint debtors, when it would not be obligatory if made after the action was barred. The statute operates upon the remedy. The debt always exists. An action brought after the lapse of six years upon a simple contract, must be upon the new promise, whether the promise was before or after the lapse of six years, express or implied, absolute or conditional. The same authority is required to make the promise before as after the six years have elapsed. Can it be said that one of several debtors can, on the last day of the sixth year, by a payment small or large, or by a new promise, either express or implied, so affect the rights of his co-debtors as to continue their liability for another space of six years, without their knowledge or assent, or any authority from them, save that to be implied from the fact that there are at the time jointly liable upon the same contract, and yet that on the very next day, without any act of the parties, such authority ceases to exist? If so, I am unable to discover upon what principle. And may the debt be thus revived from six years to six years through all time, or if not, what limit is put to the authority? If any agency is created it continues until revoked. The decision of *Van Keuren v. Parmelee* is upon the ground that no agency ever existed, not that an agency once existing had been revoked." See, also, *Bell v. Morrison*, 1 Peters, R. 360; *Dean v. Hewit*, 5 Wend. R. 257; *Tompkins v. Bruen*, 1 Denio, R. 247; *Channell v. Ditchburn*, 5 Mees. & Welsb. R. 494; *Manderston v. Robertson*, 4 Man. & Ryl. R. 440.

## CHAPTER XI.

## STATUTE OF FRAUDS.

§ 1015 *d.* In the next place, the statute of frauds may be pleaded in defence of a contract not made in compliance with its requisitions.

§ 1015 *e.* The two sections which particularly apply to contracts are the fourth and seventeenth. The fourth section enacts that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract for the sale of lands, tenements, and hereditaments, or any interest in or concerning them, or upon any agreement which is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action should be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

§ 1015 *f.* This section has given rise to many questions in respect to guarantors, executors, auctioneers, trustees, agents, which have already been considered under these proper heads, in various parts of this treatise; but it may be as well here

briefly to recapitulate some of the principal rules which have been laid down.

§ 1015 *g.* The first clause relating to the special promise of an executor or administrator to answer damages out of his own estate, has been held not to apply to cases where a bond has been given to the judge of probate to pay the debts and legacies of the testator; for the bond in itself is an admission of sufficient assets, which the executor is estopped to deny.<sup>1</sup>

§ 1015 *h.* The clause relating to the “debt, default, or miscarriage of another person,” refers not only to promises to answer for the debt, default, or miscarriage of another person arising out of his *contract*, but also to such as arise from his *tort*.<sup>2</sup> It applies only to collateral engagements of guaranty, where the liability of the guarantor is conditional and depends upon the default of the party originally liable.<sup>3</sup> If it be a money liability, the statute does not apply, and in the absence of evidence showing distinctly that the promise is collateral, it will be treated as original.<sup>4</sup> So, also, the statute does not apply to cases where the liability to pay the debt of another arises by operation of law and not of special contract,—as if a person be made a trustee to pay over to a third person a proportion of certain funds given to him for such purpose.<sup>5</sup> So, where the incidental effect of the promise is to pay the debt of

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<sup>1</sup> Stebbins *v.* Smith, 4 Pick. R. 99.

<sup>2</sup> Kirkham *v.* Marter, 2 Barn. & Ald. R. 613; Buckmyr *v.* Darnall, Lord Raym. R. 1085; Green *v.* Cresswell, 10 Adolph. & Ell. R. 453.

<sup>3</sup> Peckham *v.* Faria, 3 Doug. R. 13; Matson *v.* Wharam, 2 T. R. 80; Austin *v.* Baker, 12 Mod. R. 250; Cahill *v.* Bigelow, 18 Pick. R. 369. See ante, § 861, and cases cited; Johnson *v.* Gilbert, 4 Hill, R. 178.

<sup>4</sup> Beaman *v.* Russell, 20 Verm. R. 205; Eastwood *v.* Kenyon, 11 Adolph. & Ell. R. 438.

<sup>5</sup> Bradley *v.* Field, 3 Wend. R. 272; Williams *v.* Leper, 3 Burr. R. 1886; Nelson *v.* Boynton, 3 Metcalf, R. 396; Edward *v.* Kelly, 6 Maule & Selw. R. 204.

another; yet if the leading object of the special promisor be to subserve some purpose of his own, it is not within the statute.<sup>1</sup> Where, therefore, one of several joint creditors promises to pay the debt, the statute does not apply, since the primal object of the promisor was his own discharge, and the discharge of the others is merely incidental.<sup>2</sup>

§ 1015 i. In respect to the next clause relating to agreements made in consideration of marriage, a distinction has been taken in England between contracts in consideration of marriage, such as settlements and provisions in view thereof, and simple promises to marry,—the latter not being within the statute.<sup>3</sup> But such promise must not be to marry after the space of a year, otherwise the subsequent clause of the statute would apply, and it must be in writing.<sup>4</sup> But whether a settlement made after marriage, founded on parol agreement before marriage, would be supported as upon sufficient consideration, seems questionable, though the preponderance of authority would seem to be in favor of upholding it.<sup>5</sup> The

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<sup>1</sup> In *Nelson v. Boynton*, 3 Metcalf, R. 396, Mr. Chief Justice Shaw thus states the rule: "The terms original and collateral promise, though not used in the statute, are convenient enough, to distinguish between the cases, where the direct and leading object of the promise is, to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is, to subserve or promote some interest or purpose of his own. The former, whether made before, or after, or at the same time with the promise of the principal, is not valid, unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because although the effect of it is to release or suspend the debt of another, yet that is not the leading object on the part of the promisor."

<sup>2</sup> *Castling v. Aubert*, 2 East, R. 325.

<sup>3</sup> *Cork v. Baker*, 1 Strange, R. 34; *Harrison v. Cage*, 1 Ld. Raym. R. 387.

<sup>4</sup> *Derby v. Phelps*, 2 New Hamp. R. 515.

<sup>5</sup> *Randall v. Morgan*, 12 Ves. R. 67. In this case it was questioned; but Lord Thurlow in *Dundas v. Dutens*, 1 Ves. jr. R. 196, and Mr. Justice Story in *Jenkins v. Eldridge*, 3 Story, R. 291, uphold the validity of the contract. See, also, *Simmons v. Simmons*, 6 Hare, R. 352. See, however, *Montacute v. Maxwell*, 1 P. Wms. R. 618.

celebration of the marriage is not considered as such a part performance of contracts in consideration of marriage as to take them out of the statute.<sup>1</sup>

§ 1015 *j.* The next clause relating to "any contract or sale of lands, tenements, or hereditaments, or any interest in and concerning them," has been held not to apply to mere licenses to use land for a time to store goods or stock upon, or to shoot over, or perhaps to cut trees on,<sup>2</sup> though it does apply to all easements to pass over land, because the easement is merely incidental to the main contract.<sup>3</sup> Contracts relating to stock of a corporation are not within the clause, even where the corporation holds only real estate and derives its profits therefrom; such stocks being considered as personal property, the income only of which is divisible among the stockholders; but if the land be vested in the individual stockholders, the rule would be different.<sup>4</sup>

§ 1015 *k.* The question whether a contract for articles which are the produce of land is within this clause of the statute, has given rise to many and conflicting judgments. The cases are so contradictory that it is difficult to state any rule, and it has been said by Lord Abinger that "taking the cases all together, no general rule is laid down in any one of

<sup>1</sup> *Dundas v. Dutens*, 1 Ves. jr. R. 196; *Montacute v. Maxwell*, 1 P. Williams, R. 618; s. c. 1 Strange, R. 236.

<sup>2</sup> *Nettleton v. Sikes*, 8 Metcalf, R. 34. But see *Smith v. Surman*, 9 Barn. & Cres. R. 561.

<sup>3</sup> *Carrington v. Roots*, 2 Mees. & Welsb. R. 248; *Whitmarsh v. Walker*, 1 Metcalf, R. 313; *Dubois v. Kelly*, 10 Barb. R. 496; *Wolfe v. Frost*, 4 Sandford, Ch. R. 72; *Riddle v. Brown*, 20 Ala. R. 412; *Mumford v. Whitney*, 15 Wend. R. 380; *Stevens v. Stevens*, 11 Met. R. 313; *Houghtaling v. Houghtaling*, 5 Barb. R. 379; *Thomas v. Sorrell, Vaugh.* R. 350, in which last case the distinction between a mere license and a license coupled with a grant is admirably stated; *Wickham v. Hawker*, 7 Mees. & Welsb. R. 63.

<sup>4</sup> *Bligh v. Brent*, 2 Young & Coll. R. 268.

them that is not contradicted by some other.”<sup>1</sup> It is, as Sir Lucius O’Trigger says, “a very pretty quarrel.”<sup>2</sup> The late cases seem, however, clearly to recognize this distinction, that where the contract is for things growing in the land which are such as would go to the heir, it is within the statute; when it is for such crops as would go to the executor, or may be sold on execution, it is a sale of chattels not within this clause.<sup>3</sup> Another way of putting the distinction is between annual productions caused by the labor of man which are not within the statute, and the annual productions of nature not referable to the industry of man except at the period when they were first planted, which are within the statute.<sup>4</sup> Under the former class are growing crops of grain and vegetables.<sup>5</sup>

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<sup>1</sup> Rodwell *v.* Phillips, 9 Mees. & Welsb. R. 505.

<sup>2</sup> In Scorell *v.* Boxall, 1 Young & Jerv. R. 399, Baron Hullock says: “My Brothers Bayley and Holroyd, in the case of Mayfield *v.* Wadsley, were of opinion that an off-going crop might be considered as goods and chattels; and the judgment of Mr. Justice Littledale in that of Evans *v.* Roberts, proceeds expressly on the ground of distinction between such things as go to the heir or to the executor. There is a manifest distinction between crops, and the subject-matter of this contract. It is true that the *dictum* in Lord Raymond is opposed to this opinion; but it is to be remembered that if that were law, the several modern cases, which have been decided, could never have arisen. I must confess, that I never before heard that *dictum* cited as an authority; and the only claim which it has, in my opinion, to that distinction, is the allusion to it by Mr. Justice Holroyd.”

<sup>3</sup> This is so stated in Evans *v.* Roberts, 5 Barn. & Cres. R. 829; Scorell *v.* Boxall, 1 Young & Jerv. R. 398; The Bank of Lansingburgh *v.* Crary, 1 Barb. R. 545.

<sup>4</sup> Rodwell *v.* Phillips, 9 Mees. & Welsb. R. 505, per Lord Abinger. So, also, in Sainsbury *v.* Matthews, 4 Mees. & Welsb. R. 343; Green *v.* Armstrong, 1 Denio, R. 554.

<sup>5</sup> A contract for *crops of potatoes* is held to be a contract for chattels and not within the statute, in Jones *v.* Flint, 10 Adolph. & Ell. R. 753; Sainsbury *v.* Matthews, 4 Mees. & Welsb. R. 343; Warwick *v.* Bruce, 2 M. & Selw. R. 209; Parker *v.* Staniland, 11 East, R. 363. A crop of corn is held to be a contract for chattels personal, in Jones *v.* Flint, 10 Adolph. & Ell. R. 753, and Newcomb *v.* Raner, 2 Johns. R. 421, note. *Growing wheat* has been held to be a chattel not within the statute in Stewart *v.* Doughty, 9 Johns. R. 112;

Under the latter class are growing trees, fruit, grass, not severed from the land.<sup>1</sup> If they be severed from the land they become of course mere chattels.<sup>2</sup>

*Whipple v. Foot*, 2 Johns. R. 422; *Green v. Armstrong*, 1 Denio, R. 554. In *Waddington v. Bristow*, 2 Bos. & Pul. R. 452, *growing hops* are said to be an interest in land; but in *Rodwell v. Phillips*, 9 Mees. & Welsb. R. 503, Baron Parke says, "that case would now probably be decided differently."

<sup>1</sup> A contract for *growing trees* is said to be for an interest in land in *Green v. Armstrong*, 1 Denio, R. 554; *Warren v. Leland*, 2 Barb. R. 613; *Bank of Lansingburgh v. Crary*, 1 Barb. R. 542; *Putney v. Day*, 6 N. Hamp. R. 431; *Olmstead v. Niles*, 7 Ibid. 522; *Teal v. Auty*, 2 Brod. & Bing. R. 99. The contrary rule as to *growing trees* has been held in Massachusetts in *Whitmarsh v. Walker*, 1 Metcalf, R. 313, and *Nettleton v. Sikes*, 8 Metcalf, R. 34. In the case of *Smith v. Surman*, 9 Barn. & Cres. R. 561, a distinction is taken between the sale of *growing trees*, which the owner is to cut down before delivery, and those which the buyer is to have a right to enter and cut down, the latter class of contracts being within the statute. In *Mayfield v. Wadsley*, 3 Barn. & Cres. R. 357; *Crosby v. Wadsworth*, 6 East, R. 602, a contract for *growing underwood* is held not to convey an interest in land. But in *Scorell v. Boxall*, 1 Young & Jerv. R. 398, the contrary is held. A *growing crop of grass* is held to be an interest in land in *Carrington v. Roots*, 2 Mees. & Welsb. R. 248, and *Bank of Lansingburgh v. Crary*, 1 Barb. R. 542; *Crosby v. Wadsworth*, 6 East, R. 602. If quite ripe it is only a chattel, is held in *Jones v. Flint*, 10 Adolph. & Ell. R. 753. *Growing fruit* is held to be within the statute in *Rodwell v. Phillips*, 9 Mees. & Welsb. R. 503. In this conflict of cases it is difficult to state a rule other than that in the text. It is hopeless to attempt to reconcile them. In a late case in Ireland, *Danne v. Ferguson Hayes*, R. 540, where the question was in respect to a *crop of turnips* sown a short time previously, Joy, C. B. thus laid down the rule: "The general question for our decision is, whether in this case, there has been a contract for an interest concerning lands, within the second [fourth] section of the statute of frauds; or whether it merely concerned goods and chattels; and that question resolved itself into another, whether or not a *growing crop* is goods and chattels. The decisions have been very contradictory,—a result which is always to be expected when the judges give themselves up to fine distinctions. In one case, it has been held that a contract for potatoes did not require a note in writing, because the potatoes were ripe; and in another case, the distinction turned upon the hand that was to dig them; so that if dug by A. B., they were potatoes; and if by C. D., they were an interest in lands. Such a course

<sup>2</sup> *Bank of Lansingburgh v. Crary*, 1 Barb. R. 542; *Warren v. Leland*, 2 Barb. R. 619.

§ 1015 *l.* Where a contract originally within the clause of the statute, so that it could not be enforced as an executory contract, has been executed, and payment of the consideration is claimed, it may be recovered, not as upon the original contract, but on the ground of an implied promise, and so it should be stated in the declaration.<sup>1</sup>

§ 1015 *m.* The next clause requires that all contracts be in writing unless they "are to be performed within one year from the making thereof." The agreement need not be express that the contract be performed within the year, provided it be capable of being performed within the year, and that it appear to have been the understanding and expectation of the parties that it should be so performed; and in such case, the mere fact that the contract is not actually and completely performed within the year does not bring it within the statute. Again, although the probability be that the contract will not be per-

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always involves the judge in perplexity, and the cases in obscurity. Another criterion must, therefore, be had recourse to; and fortunately, the later cases have rested the matter on a more rational and solid foundation. At common law, growing crops were uniformly held to be *goods*; and they were subject to all the legal consequences of being goods, as seizure in execution, &c. The statute of frauds takes things as it finds them; and provides for lands and goods, according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop had been held to be an interest in lands, it would come within the second [fourth] section of the act; but if it were only goods and chattels, then it came within the thirteenth [seventeenth] section. On this, the only rational ground, the cases of *Evans v. Roberts*, 5 B. & Cr. R. 829; *Smith v. Surman*, 9 B. & Cr. R. 561, and *Scorell v. Boxall*, 1 Y. & Jerv. R. 396, have all been decided. And as we think that growing crops have all the consequences of chattels, and are, like them, liable to be taken in execution, we must rule the points saved for the plaintiff." See, also, *Earl of Falmouth v. Thomas*, 1 Cromp. & Mees. R. 89.

<sup>1</sup> *Souch v. Shawbridge*, 2 C. B. R. 808; *Cocking v. Ward*, 1 C. B. R. 858; *Kelley v. Webster*, 12 Ib. 283; *Brackett v. Evans*, 1 Cush. R. 79; *Preble v. Baldwin*, 6 Ibid. 549; *Thomas v. Dickinson*, 14 Barb. R. 90; *Linscott v. McIntire*, 15 Maine R. 201.

formed within the year, yet if it be susceptible of performance within the time, it will not be within the statute.<sup>1</sup> So, if it be merely optional with one party, if he shall perform it within a year or not, it is not within the statute.<sup>2</sup> But where by the express agreement of the parties the contract is not to be performed within the year from the making thereof, it will be within the statute, although the work contemplated be only for a year's time. Thus, a contract made on July 20th, for a year's service to be rendered from the 24th of July, must be in writing.<sup>3</sup> But a contract for a year with no time stated when it shall commence, is not within the statute, since it may commence immediately.<sup>4</sup> But a contract for several years with annual payments is within the statute,<sup>5</sup> even though it be within the terms of the contract that either party may terminate it within the year.<sup>6</sup>

**1015 n.** So, also, where by the subject-matter of the contract and the circumstances of the case, it appears clearly that it was the intention and understanding of the parties, that the contract was not to be performed within a year, the statute will apply.<sup>7</sup> Such an understanding should, however, clearly appear from the contract as a whole.

<sup>1</sup> *Lyon v. King*, 11 Metcalf, R. 411; *Wells v. Horton*, 4 Bing. R. 40; *Peters v. Westborough*, 19 Pick. R. 364.

<sup>2</sup> *Kent v. Kent*, 18 Pick. R. 569.

<sup>3</sup> *Bracegirdle v. Heald*, 1 Barn. & Ald. R. 722. See, also, *Snelling v. Lord Huntingfield*, 1 Cromp. Mees. & Rosc. R. 20.

<sup>4</sup> *Kent v. Kent*, 18 Pick. R. 569; *Russell v. Slade*, 12 Conn. R. 455; *Linscott v. McIntire*, 15 Maine R. 201; *Plimpton v. Curtiss*, 15 Wend. R. 336.

<sup>5</sup> *Birch v. The Earl of Liverpool*, 9 Barn. & Cres. R. 392. See, also, *Lower v. Winters*, 7 Cowen, R. 263; *Derby v. Phelps*, 2 N. Hamp. R. 515; *Hinckley v. Southgate*, 11 Verm. R. 428; *Harris v. Porter*, 2 Harrington, R. 27; *Sweet v. Lee*, 4 Scott, N. R. 77; *Lapham v. Whipple*, 8 Metcalf, R. 59; *Wilson v. Martin*, 1 Denio, R. 602; *Pitkin v. Long Is. R. R. Co.* 2 Barb. Ch. R. 221; *Drummond v. Burrell*, 13 Wend. R. 307; *Giraud v. Richmond*, 2 Com. B. R. 835.

<sup>6</sup> *Harris v. Porter*, 2 Harrington, R. 27.

<sup>7</sup> *Herrin v. Butters*, 20 Maine R. 119; *Boydell v. Drummond*, 11 East, R.

1015 o. Again, where the time when the contract is to be performed depends on some contingency, it is within the statute if the contingency cannot happen within the year, but if it may happen, it is not within the statute, whether it actually do or not.<sup>1</sup> Thus, a promise to pay a certain sum on the event of a person's marriage or death;<sup>2</sup> or a stipulation not to engage in a certain business during life would not be within the statute;<sup>3</sup> since the marriage or death might take place within the year.

§ 1015 p. Again, where the performance of the contract is contemplated to be within the year, but the payment therefor is to be after the year is past,—as an agreement to purchase goods to be delivered in six months and paid for in eighteen months,—it is not within the statute.<sup>4</sup>

§ 1015 q. The next clause is, that no action shall be brought “unless the agreement or some memorandum or note thereof shall be in writing, signed by the party to be charged therewith or some other person thereunto, by him lawfully authorized.” This gives rise to many questions. 1st. What is a sufficient statement of the agreement? 2d. What is a sufficient signing? 3d. What is a sufficient authority in an agreement to sign for his principal?

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142; *Peters v. Westborough*, 19 Pick. R. 364. But see *Moore v. Fox*, 10 Johns. R. 244, where it is said that there must appear to be a *specific* and *express* agreement to bring the contract within the statute. See, also, *Fenton v. Emblers*, 3 Burr. R. 1278.

<sup>1</sup> *Wells v. Horton*, 4 Bing. R. 40; *Foster v. MacO'Blenis*, 18 Missouri R. 88; *Gilbert v. Sykes*, 16 East, R. 150; *Souch v. Strawbridge*, 2 C. B. R. 808; *Blake v. Cole*, 22 Pick. R. 97; *Roberts v. The Rockbottom Co.* 7 Metcalf, R. 46; *Clark v. Pendleton*, 20 Conn. R. 495; *McLees v. Hale*, 10 Wend. R. 426. But see *Tolley v. Greene*, 2 Sandf. Ch. R. 91.

<sup>2</sup> *Peter v. Compton, Skin.* R. 353; *Fenton v. Emblers*, 3 Burr. R. 1278  
*Wells v. Horton*, 4 Bing. R. 40.

<sup>3</sup> *Lyon v. King*, 11 Metcalf, R. 411.

<sup>4</sup> *Donellan v. Read*, 3 Barn. & Adolph. R. 899; *Bracegirdle v. Heald*, 1

§ 1015 r. What is a sufficient statement of the agreement? The rule is that the written contract should set forth the terms so as intelligibly to express the intention and obligation of the parties. The use of the term "agreement" has given rise to much question as to whether the memorandum or note should state the consideration as well as the promise, and it has been uniformly held in England, though not without the disapprobation of some of the courts,<sup>1</sup> that the consideration must be expressed.<sup>2</sup> It is, however, sufficient, if it can be clearly or unequivocally collected from all the terms of the memorandum, so that it is evident to any person of ordinary capacity.<sup>3</sup> In this country, however, the rule is different in different States. In some of them the words of the English statute have been copied, and the construction of the English courts has been adopted.<sup>4</sup> In others the word "agreement" has been rejected, and it has been held sufficient if the promise clearly appear,<sup>5</sup>

Barn. & Ald. R. 722; Stone *v.* Dennison, 13 Pick. R. 1; Cherry *v.* Heming, 4 Excheq. R. 631; Mavor *v.* Pyne, 3 Bing. R. 285.

<sup>1</sup> *Ex parte Gardom*, 15 Ves. R. 286. See ante, § 862, note.

<sup>2</sup> *Wain v. Walters*, 5 East, R. 10, is the leading case on this subject. See, also, *Stadt v. Lill*, 9 East, R. 348; *Jenkins v. Reynolds*, 3 Brod. & Bing. R. 14; *Clavey v. Piggott*, 2 Adolph. & Ell. R. 473; *Sweet v. Lee*, 3 Mann. & Grang. R. 452; *Bainbridge v. Wade*, 16 Q. B. R. 89; *Morley v. Boothby*, 3 Bing. R. 107; *James v. Williams*, 3 Nev. & Man. R. 196. See also ante, § 862, and note.

<sup>3</sup> *Bainbridge v. Wade*, 1 Eng. Law & Eq. R. 236; *Hawes v. Armstrong*, 1 Scott, R. 661; *Steele v. Hoe*, 14 Q. B. R. 431; *Goldshede v. Swan*, 1 Excheq. R. 154; *Chapman v. Sutton*, 2 C. B. R. 634; *Jarvis v. Wilkins*, 7 Mees. & Welsb. R. 410; *Kennaway v. Treleavan*, 5 Ibid. 498; *Newbury v. Armstrong*, 6 Bing. R. 201.

<sup>4</sup> 2 Rev. Stat. of New York, p. 2, ch. 7, tit. 2, § 2; *Sears v. Brink*, 3 Johns. R. 210; *Rogers v. Kneeland*, 10 Wend. R. 218; *Bennett v. Pratt*, 4 Denio, R. 275; *Stacks v. Howlett*, Ibid. 559; *Wyman v. Gray*, 7 Harr. & Johns. R. 409; *Elliott v. Giese*, 7 Harr. & Johns. R. 457; *Gough v. Edelen*, 5 Gill, R. 103; *Henderson v. Johnson*, 6 Geo. R. 390.

<sup>5</sup> In Virginia and Tennessee the word promise has been substituted for agreement. *Taylor v. Ross*, 3 Yerg. R. 330; *Gilman v. Kibler*, 5 Humph. R. 19; *Uren v. Pearce*, 4 Smedes & Marsh. R. 91; *Violett v. Patten*, 5 Cranch, R. 142; *DeWolf v. Raboad*, 1 Peters, R. 499. See ante, § 863.

and in others, although the word agreement is retained, the rule of construction in England has been rejected.<sup>1</sup>

§ 1015 s. Again, it is not necessary that the whole agreement should be upon one piece of paper, for if it can be fully collected from various papers referring to each other, it will

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<sup>1</sup> This is so in Massachusetts, Maine, New Jersey, North Carolina, and Connecticut. See Rev. Stat. of Mich. ch. 74, § 2; *Lent v. Padelford*, 10 Mass. R. 230. In *Packard v. Richardson*, 17 Mass. R. 122, where the action was on an indorsement of a promissory note in these words, "We acknowledge ourselves to be holden as surety for the payment of the within note" the defendants were held liable. Parker, C. J. said: "The obvious purpose of the legislature would seem to be to protect men from hasty and inconsiderate engagements, they receiving no beneficial consideration; and against a misconstruction of their words by the testimony of witnesses, who would generally be in the employment and under the influence of the party wishing to avail himself of such engagements. To remove this mischief, the promise or engagement shall be in writing, and signed; in order that it may be a deliberate act, instead of the effect of a sudden impulse, and may be certain in its proof, instead of depending upon the loose memory or biased recollection of a witness. The agreement shall be in writing — what agreement? The agreement to pay a debt, which he is under no moral or legal obligation to pay, but which he shall be held to pay, if he agrees to do it, and signs such agreement.

"This appears to be the whole object and design of the legislature; and this is effected, without a formal recognition of a consideration; which, after all, is more of a technical requisition, than a substantial ingredient in this sort of contracts. And it would seem, further, that the legislature chose to prevent an inference that the whole contract or agreement must be in writing; for it is provided that some memorandum or note thereof in writing shall be sufficient. What is this but to say, that if it appear by a written memorandum or note, signed by the party, that he intended to become answerable for the debt of another, he shall be bound, otherwise not?

"How then is it possible, with these expressions in the statute, to insist upon a formal agreement, containing all the motives or inducements which influenced the party to become bound? Yet such is the decision of the Court of King's Bench, in the case of *Wain v. Warlters*." See, also, *Sage v. Wilcox*, 6 Conn. R. 81; *Tufts v. Tufts*, 3 W. & M. R. 456; *Levy v. Merrill*, 4 Greenl. R. 180; *Buckley v. Beardslee*, 2 South. R. 570; *Reed v. Evans*, 17 Ohio R. 128; *How v. Kemball*, 2 McLean, R. 103; *Gilligan v. Boardman*, 29 Maine R. 79.

be a sufficient memorandum or note in writing.<sup>1</sup> But where a contract is made by various letters, referring to each other, the whole terms of the contract must clearly appear therein, or they will not be a sufficient memorandum.<sup>2</sup> But this connection must appear in the papers themselves, and extrinsic evidence connecting them, and showing them to belong to the same transaction, would not be allowed.<sup>3</sup> But although the memorandum itself be not, taken alone, sufficiently clear, yet if reference be therein made to another paper or deed as con-

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<sup>1</sup> Jackson *v.* Lowe, 1 Bing. R. 9; Redhead *v.* Cator, 1 Stark. R. 14; Dobell *v.* Hutchinson, 3 Adolph. & Ell. R. 355; Brettel *v.* Williams, 5 Excheq. R. 623; Saunderson *v.* Jackson, 2 Bos. & Pul. R. 238; Emmott *v.* Kearns, 5 Bing. N. C. R. 559; Forster *v.* Hale, 3 Sumner, R. 696; Ide *v.* Stanton, 15 Verm. R. 686. See ante, § 862, note, for other cases.

<sup>2</sup> Archer *v.* Baynes, 5 Excheq. R. 625. In this case various letters passed, but they did not clearly explain whether the contract was a sale by sample or not, and it was held that the contract was void by the statute. Alderson, B. said: "No doubt, if the letter of the plaintiff of the 3d of October, and of the defendant in answer, taken together, contained a sufficient contract, namely, one that would express all its terms, they would constitute a memorandum in writing within the statute. We have no difficulty, therefore, in coming to the conclusion that these letters may be looked at for the purpose of seeing whether or not they contain a sufficient contract to take the case out of the statute; but looking at them, we do not think they do. They do not express all the terms of the contract; and the case is in truth governed by Richards *v.* Porter, which was cited in the course of the argument, and in which Lord Tenterden gave a similar decision as to a document of a similar nature which was then before him. There is a distinct refusal on the part of the defendant to accept the flour which he had bought of the plaintiff. It is clear from the letters, that he had bought the flour from the plaintiff upon some contract or other; but whether he bought it on a contract to take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a particular sample which had been delivered to him, on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties is not settled by the contract in writing." Richards *v.* Porter, 6 Barn. & Cres. R. 437.

<sup>3</sup> Brodie *v.* St. Paul, 1 Ves. jr. R. 326; Ide *v.* Stanton, 15 Verm. R. 685; Clinan *v.* Cooke, 1 Sch. & Lef. R. 22; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. R. 273; Richards *v.* Porter, 6 Barn. & Cres. R. 437; Archer *v.* Baynes, 5 Excheq. R. 625.

taining the terms, or by which the agreement can be rendered definite and clear, it will be sufficient.<sup>1</sup>

§ 1015 *t.* 2d. What is a sufficient signing? It is not necessary that the agreement itself should be signed and subscribed by the promisor, provided he acknowledge in writing by letter or otherwise that the contract as stated in some other paper or letter is his.<sup>2</sup> Thus, where only a verbal agreement was made, but a letter was subsequently written by one party, containing a statement of the terms of the contract, which the other party in his answer acknowledged as being correct, it was held to be sufficient.<sup>3</sup> But where the paper containing the terms of the contract is not signed, it must clearly appear that the writing acknowledging the contract refers unequivocally thereto, for any fair doubt in such a case would be fatal.<sup>4</sup> *A fortiori* if the terms be stated differently in the two papers, the contract would be void.<sup>5</sup>

§ 1015 *u.* Again, it is not necessary that the memorandum be subscribed at the end by the promisor, provided his name appear in the body of the memorandum, and the circumstances of the case do not show that he did not intend to be bound thereby,<sup>6</sup>—as if he make the memorandum as a propo-

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<sup>1</sup> *Owen v. Thomas*, 3 Mylne & Keen, R. 353.

<sup>2</sup> See cases cited *supra*.

<sup>3</sup> *Jackson v. Lowe*, 1 Bing. R. 9. See, also, *Dobell v. Hutchinson*, 3 Adolph. & Ell. R. 355.

<sup>4</sup> *BoydeLL v. Drummond*, 2 Camp. R. 157.

<sup>5</sup> *Cooper v. Smith*, 15 East, R. 103; *Archer v. Baynes*, 5 Excheq. R. 625.

<sup>6</sup> *Cabot v. Haskins*, 3 Pick. R. 83; *Cowie v. Remfry*, 10 Jur. R. 789; *Stokes v. Moore*, 1 Cox, R. 219. In this case an agreement was made for the renewal of a lease, and the defendant wrote instructions to an attorney by which the same was to be prepared, in these words: "The lease renewed, Mrs. Stokes to pay the king's tax, also to pay Moore £24 a year, half-yearly," and it was held not to be a sufficient memorandum. *Skyner*, C. B., said: "The question in this case is, whether the written note stated in the pleadings is such an agreement as is within the meaning of the statute of frauds. These

sition, intending to sign it, if agreed to by the other party. But the question whether the party intended to be bound by the memorandum when unsigned, is for the jury to determine.<sup>1</sup>

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are instructions to the attorney for the preparation of the lease. This is no formal signature of the defendant's name, but one term of the instructions is, that the rent is to be paid to Moore; and the question is, whether the name so inserted and written by the defendant is a sufficient signing. The purport of the statute is manifest, to avoid all parol agreements, and that none should have effect, but those signed in the manner therein specified. It is argued that the name being inserted in any part of the writing is a sufficient signature. The meaning of the statute is, that it should amount to an *acknowledgment by the party* that it is his agreement, and if the name does not give such authenticity to the instrument, it does not amount to what the statute requires. Here the insertion of the name has not this effect. This memorandum might be drawn subject to additions or alterations, and does not appear to be the final agreement of the parties, and indeed as far as we can admit parol evidence, it is proved not to be so, for the subject of repairs is not mentioned in the instructions; which shows that the ends of the statute are not to be obtained, if so informal a paper is to be admitted as a written agreement. No case has been adduced in point, but it has been compared to the case of wills, where a name written in the introduction has been considered as a signature, but that seems to me a very different case. The cases on wills have been where the instrument, importing to be the final instrument of the party, has been formally attested, and it is in its nature complete, and the only question has been, whether the form of the statute has been complied with. In the present case I think it is by no means so, and it would be of very dangerous tendency to admit the memorandum to be an agreement within the statute." Eyre, B., added: "I think this cannot be considered such a signature as the statute requires. The signature is to have the effect of giving authenticity to the whole instrument, and if the name is inserted *so as to have that effect*, I do not think it signifies much, in what part of the instrument it is to be found: it is perhaps difficult, except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect; and there the name being generally found in a particular place by the common usage of mankind, it may very probably have the effect of a legal signature, and extend to the whole; but I do not understand how a name inserted in the body of an instrument, and *applicable to particular purposes*, can amount to such an authentication as is required by the statute."

<sup>1</sup> In Johnson v. Dodgson, 2 Mees. & Welsb. R. 653, the defendant wrote a memorandum of the contract in his books, and requested the other's signature, and it was held sufficient, although his name only appeared in the body

So, also, where over a signature already written, words are introduced into a paper or an alteration is made in it, they will be considered authenticated, if they be plainly intended so to be.<sup>1</sup> In some of the States of this country, the word "subscribed" is substituted for the word "signed," and the signature is required therefore to be at the end.<sup>2</sup>

§ 1015 *v.* It is not requisite that the memorandum should be signed by both parties, but only by him who is to be charged by it, and if it be signed by him alone, he cannot avoid the contract by showing that the other party did not sign.<sup>3</sup>

§ 1015 *w.* Again, the signature of the party to be charged,

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of the memorandum. Lord Abinger said: "The statute of frauds requires that there should be a note or memorandum of the contract in writing, signed by the party to be charged. And the cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and recognized by him. I think in this case the requisitions of the statute are fully complied with." See, also, *Merritt v. Clason*, 12 Johns. R. 102; *Clason v. Bailey*, 14 Ib. 484; *Ogilvie v. Foljambe*, 3 Meriv. R. 53; *Penniman v. Hartshorn*, 13 Mass. R. 87.

<sup>1</sup> *Bluck v. Gompertz*, 7 Excheq. R. 862.

<sup>2</sup> *New York Rev. Stat.* pt. 2, ch. 7, tit. 1, § 8; *Davis v. Shields*, 24 Wend. R. 322; 26 Ibid. 341; *Vielie v. Osgood*, 8 Barb. R. 130. But see *contra*, *James v. Patten*, 8 Barb. R. 344.

<sup>3</sup> *Iattan v. Gray*, 2 Ch. Cas. R. 164; *Seton v. Slade*, 7 Ves. R. 265; *Fenley v. Stewart*, 5 Sandf. R. 101; *Egerton v. Mathews*, 6 East, R. 307; *Laythoarp v. Bryant*, 2 Bing. N. C. R. 737; *Ballard v. Walker*, 3 Johns. Cas. 60; *Penniman v. Hartshorn*, 13 Mass. R. 87; *McCrea v. Purmort*, 16 Wend. R. 460; *Shirley v. Shirley*, 7 Blackf. R. 452; *Clason v. Bailey*, 14 Johns. R. 484; *Barstow v. Gray*, 3 Greenl. R. 409. But see *Lawrenson v. Butler*, 1 Sch. & Lef. R. 13, in which Lord Redesdale questions this rule. It is, however, quite settled by the cases. See, also, note to *Sweet v. Lee*, 3 Man. & Grang. R. 462.

if written in pencil,<sup>1</sup> or stamped by him in print, will be sufficient. And if a party write out an agreement over his printed name, or allow another to do so assentingly, he will be bound thereby, especially if it appear that he is in the habit of so doing.<sup>2</sup>

§ 1015 *x.* 3d. What is sufficient when the paper is signed by an agent? The authority of the agent may be by parol, and it is only required that he be previously empowered to act as an agent, or that his authority be subsequently recognized by the party for whom he acts.<sup>3</sup> But the law will not presume an authority on the part of the agent; it must result from a special authorization by the principal, or clearly arise by implication from the nature of his employment.<sup>4</sup> So, too, if the actual writing or the circumstances of the case show, that the signing is incomplete, and that the subsequent signature of the principal was looked to, as fully executing it, the signing by the agent would not be sufficient.<sup>5</sup> It should, however, appear that he signs, as agent, for if nothing appear to indicate his agency to the party with whom he deals, such party could not be charged by the person for whom he acts.<sup>6</sup> He need not, however, state his agency on the paper, but may sign his own name solely, if he be clearly understood to act in such capacity, and parol evidence is admissible to

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<sup>1</sup> *Merritt v. Clason*, 12 Johns. R. 102; *Draper v. Pattina*, 2 Speers, R. 292; *Geary v. Physic*, 5 Barn. & Cres. R. 234; *Clason v. Bailey*, 14 Johns. R. 481; *McDowell v. Chambers*, 1 Strob. Eq. R. 347.

<sup>2</sup> *Schneider v. Norris*, 2 Maule & Selw. R. 286; *Saunderson v. Jackson*, 3 Esp. R. 180.

<sup>3</sup> *Maclean v. Dunn*, 4 Bing. R. 722; *Trueman v. Loder*, 11 Adolph. & Ell. R. 589.

<sup>4</sup> *Graham v. Musson*, 5 Bing. N. C. R. 603; *Hawkins v. Chace*, 19 Pick. R. 502; *Dixon v. Broomfield*, 2 Chitty, R. 205; *Pitts v. Beckett*, 13 Mees. & & Welsb. R. 743; *Hodgkins v. Bond*, 1 N. Hamp. R. 284.

<sup>5</sup> *Hubert v. Turner*, 4 Scott, N. R. 486; *Stokes v. Moore*, 1 Cox, R. 219. See note 1, p. 675.

<sup>6</sup> *Shaw v. Finney*, 13 Metcalf, R. 453.

show that he was recognized by the other party as so acting.<sup>1</sup>

§ 1015 *y*. The agent must be a third person, and one party cannot act as agent for the other.<sup>2</sup> But one person may be the agent of both parties, as in the case of an auctioneer or broker,<sup>3</sup> who may bind both parties by an entry in his books, or by the bought and sold notes he delivered,<sup>4</sup> provided they correspond, and not otherwise,<sup>5</sup> unless, indeed, the difference be wholly immaterial.<sup>6</sup>

§ 1015 *z*. The seventeenth section of the statute of frauds enacts, that no contract for the sale of any goods, wares, or merchandises for the price of ten pounds sterling or upwards shall be allowed to be good, except, 1st, the buyer shall accept part of the goods so sold, and actually receive the same, or 2d, give something in earnest to bind the bargain or in part payment, or 3d, that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agent, thereunto lawfully authorized.

§ 1015 *aa*. The general construction of this section is similar to that of the fourth section, just considered, in respect to the first exception relating to the note or memorandum required, and the signature of the party or his agent; but the first exception, that "the buyer shall accept part of the goods, and

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<sup>1</sup> *Trueman v. Loder*, 11 Adolph. & Ell. R. 589.

<sup>2</sup> *Wright v. Dannah*, 2 Camp. R. 203; *Sewall v. Fitch*, 8 Cowen, R. 215; *Rayner v. Linthorne*, 2 Car. & Payne, R. 124; *Farebrother v. Simmons*, 5 Barn. & Ald. R. 333. See ante, § 786.

<sup>3</sup> See ante, § 342-346, § 786, and cases cited; *Farebrother v. Simmons*, 5 Barn. & Ald. R. 333; *Morton v. Dean*, 13 Metcalf, R. 385; *Coles v. Trecothick*, 9 Ves. R. 234.

<sup>4</sup> Ante, § 346, § 786, and cases cited.

<sup>5</sup> *Thornton v. Kempster*, 5 Taunt. R. 786.

<sup>6</sup> *Maclean v. Dunn*, 1 Moore & Payne, R. 778.

actually receive the same," has given rise to various apparently conflicting decisions as to what constitutes a sufficient delivery and acceptance, under the statute, the question being by no means carefully distinguished in the language of the courts from the different questions as to what constitutes a sufficient delivery and acceptance to give a right of property, or to destroy a stoppage *in transitu*, or to annihilate the seller's right of lien. These questions are fully considered in the portion of this book relating to contracts of sale, to which the reader is here referred. The general rules may, however, be here stated.

§ 1015 *bb.* The terms "accept" and "actually receive" have been construed to mean a final appropriation by the buyer of the whole or a part of the goods; and there must be such an acceptance as to destroy the seller's right of lien, and of stoppage *in transitu*, and of objection to the quantity or quality of the goods.<sup>1</sup> A delivery, therefore, to a carrier or middleman, will not be sufficient, unless such person be authorized finally to accept them, and actually do; and whether this is the case or not, is a question for the jury.<sup>2</sup> So, also, the acceptance must be

<sup>1</sup> Ante, § 790; *Maberley v. Sheppard*, 3 Maule & Selw. R. 442; s. c. 10 Bing. R. 99; *Baldey v. Parker*, 2 Barn. & Cres. R. 44; *Phillips v. Bistolfi*, 2 Barn. & Cres. R. 513; *Miles v. Gorton*, 2 Cromp. & Mees. R. 504. The case of *Morton v. Tibbett*, 18 Q. B. R. 428, which seems to differ from the rule laid down in the text, has not since fully found approbation. See *Hunt v. Hecht*, 20 Eng. Law & Eq. R. 524, in which Baron Martin says: "There is no acceptance unless the purchaser has exercised his option, or has done something that has deprived him of his option. *Morton v. Tibbett* is a correct decision, because the purchaser had there dealt with the goods as his own, but much that is said in that case may be open to doubt." See also *Smith v. Surman*, 9 Barn. & Cres. R. 561; *Norman v. Phillips*, 14 Mees. & Welsb. R. 277; *Howe v. Palmer*, 3 Barn. & Ald. R. 321; *Hanson v. Armitage*, 5 Barn. & Ald. R. 557; *Acebal v. Levy*, 10 Bing. R. 376; *Canliffe v. Harrison*, 6 Excheq. R. 909; *Curtis v. Pugh*, 10 C. B. R. 111; *Outwater v. Dodge*, 6 Wend. R. 397. See *Shindler v. Houston*, 1 Denio, R. 48, in which the question is fully considered.

<sup>2</sup> *Bushel v. Wheeler*, 12 Q. B. R. 442 *n*; *Snow v. Warner*, 10 Metcalf, R. 132; ante, § 790.

such, that the buyer has no right to reject the goods.<sup>1</sup> A mere marking and setting aside the goods, will not, therefore, satisfy the requisitions of the statute, unless a specific time be agreed for payment, because the vendor would still have his lien.<sup>2</sup> But an order for the delivery of goods, which absolutely changes the possession of the vendor takes the case out of the statute.<sup>3</sup> And although he have received them, yet so long as he holds them for the purposes of examination, and to determine as to their quantity and quality, there is no such acceptance as is required by the statute.<sup>4</sup>

§ 1015 *cc.* In respect to a part acceptance, the receiving and accepting of a sample is not sufficient to satisfy the statute, unless the sample is understood by both parties to be a part of the whole quantity purchased.<sup>5</sup> Where several articles are purchased together, at one time, forming one transaction, the contract will be treated as entire, so that an acceptance of any of the articles is an acceptance of the whole, within the meaning of the statute.<sup>6</sup> But if there be a different contract for two different articles, as if the sale be conditional in respect to some, and absolute in respect to others, the acceptance of one is not an acceptance of the other.<sup>7</sup>

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<sup>1</sup> *Smith v. Surman*, 9 Barn. & Cres. R. 561; *Norman v. Phillips*, 14 Mees. & Welsb. R. 227; *Acebal v. Levy*, 10 Bing. R. 376, and cases cited *supra*.

<sup>2</sup> *Carter v. Toussaint*, 5 Barn. & Ald. R. 858; *Bill v. Bament*, 9 Mees. & Welsb. R. 40; *Kent v. Huskinson*, 3 Bos. & Pul. R. 233; *Belcher v. Capper*, 5 Scott, (N. S.) R. 315. See ante, § 792.

<sup>3</sup> *Hollingsworth v. Napier*, 3 Caines, R. 185; *Dodsley v. Varley*, 12 Adolph. & Ell. R. 634; *Wilkes v. Ferris*, 5 Johns. R. 335.

<sup>4</sup> *Percival v. Blake*, 2 Car. & Payne, R. 514; *Phillips v. Bistolli*, 2 Barn. & Cres. R. 511; *Kent v. Huskinson*, 3 Bos. & Pul. R. 233.

<sup>5</sup> *Hinde v. Whitehouse*, 7 East, R. 558; *Cooper v. Elston*, 7 T. R. 14; *Klinitz v. Surry*, 5 Esp. N. P. C. R. 267; ante, § 791.

<sup>6</sup> *Elliott v. Thomas*, 3 Mees. & Welsb. R. 176; *Rohde v. Thwaites*, 6 Barn. & Cres. R. 388; *Scott v. Eastern Counties Railway Co.*, 12 Mees. & Welsb. R. 38. See also ante, § 791, § 25, et seq.

<sup>7</sup> *Miles v. Gorton*, 2 Cromp. & Mees. R. 504. See other cases cited ante, § 791.

§ 1015 *dd.* The second exception relates to the giving of earnest money, or part payment, to bind the bargain. In this respect, the rule is that there should be an actual payment of some portion of the price, although it may be very small. But the mere act of ratification, such as drawing a shilling across the hand of the seller, would not be sufficient.<sup>1</sup> There is no practical distinction between the terms earnest and part payment, within the meaning of this exception,— all that is required is that some portion of the price be actually given, however small. The mere agreement that a previous debt owing from the seller to the buyer, should be discharged and go as part payment, would not be sufficient to answer the requisitions of the statute.<sup>2</sup>

§ 1015 *ee.* Executory contracts for the delivery of goods existing at the time of the sale, are within the contract of frauds, but executory contracts for the manufacturing of articles not in existence, or for the delivery of articles after certain work and labor has been performed on them, are not within the statute.<sup>3</sup> In such cases of executory contracts, the question, whether they are within the statute, depends upon whether they are merely contracts of sale or for labor and services ; but this distinction is often very nice and difficult of practical application. According to some cases it seems that though the contract be for an article to be manufactured, yet if the seller be not the manufacturer, but intend to have it made, and agree to deliver it at a future day, the contract is one of sale, and within the statute.<sup>4</sup> So, also, in certain cases,

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<sup>1</sup> Blenkinsop *v.* Clayton, 7 Taunt. R. 597. See ante, § 788.

<sup>2</sup> Walker *v.* Nussey, 16 Mees. & Welsb. R. 302.

<sup>3</sup> Rondeau *v.* Wyatt, 2 H. Black. R. 63 ; Hight *v.* Ripley, 19 Maine R. 137 ; Robertson *v.* Vaughn, 5 Sandford, R. 1 ; Cummings *v.* Dennett, 26 Maine R. 397 ; Bronson *v.* Wiman, 10 Barb. R. 406 ; Sewall *v.* Fitch, 8 Cowen, R. 215. See also ante, § 787, and cases cited ; Crookshank *v.* Burrell, 18 Johns. R. 58 ; Watts *v.* Friend, 10 Barn. & Cres. R. 446 ; Mixer *v.* Howarth, 21 Pick. R. 205 ; Eichelberger *v.* McCauley, 5 Har. & Johns. R. 213.

<sup>4</sup> Garbutt *v.* Watson, 5 Barn. & Ald. R. 613 ; Lamb *v.* Crafts, 12 Metcalf,

although the seller be the manufacturer, yet if the contract be to sell and deliver at a future day goods not in existence, but which the seller is in the habit of manufacturing, and not a contract to manufacture them, it has been held to be within the statute.<sup>1</sup> It would, however, be very difficult to distinguish between such contracts, and the distinction is almost too nice to be practical.

§ 1015*ff.* By the Statute of 9 Geo. 4, c. 14, § 7, which was passed in extension of the Statute of Frauds, it is provided, “That the said enactments shall extend to all contracts for the sale of goods of the value of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, rendering the same fit for delivery.” This statute has not, however, been reenacted in this country.

§ 1015*gg.* The Statute of Frauds also enacts, “That all interests in lands, tenements, and hereditaments, except leases for three years, not put in writing and signed by the parties, or their agents authorized by writing, shall not have, nor be deemed in law or equity to have, any greater force or effect than leases on estates at will.” It further enacts, “That no action shall be brought, whereby to charge any person upon any agreement

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R. 356; West Middlesex Water Works Co. v. Suwerkropp, Mood. & M. R. 408; Gardner *v.* Joy, 9 Metcalf, R. 177; ante, § 787, and cases cited; Watts *v.* Friend, 10 Barn. & Cres. R. 446; Cason *v.* Cheely, 6 Geor. R. 554; Hardell *v.* McClure, 1 Chand. R. 271.

<sup>1</sup> Gardner *v.* Joy, 9 Metcalf, R. 177; Spencer *v.* Cone, 1 Metcalf, R. 283; Lamb *v.* Crafts, 12 Metcalf, R. 353; Watts *v.* Friend, 10 Barn. & Cres. R.; Wilks *v.* Atkinson, 6 Taunt. R. 11. But see contra, Robertson *v.* Vaughan, 5 Sandf. R. 1; Sewall *v.* Fitch, 8 Cowen, R. 215; Hight *v.* Ripley, 19 Maine, R. 137; Cooper *v.* Elston, 7 T. R. 14; Rondeau *v.* Wyatt, 2 H. Black. R. 63; Clayton *v.* Andrews, 4 Burr. R. 2101.

made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, or upon any agreement, that is not to be performed within the space of one year from the making thereof, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party or his lawful agent."

§ 1015 *hh.* It may be as well here to consider, very briefly, the cases in which a court of equity will decree a specific performance of contracts respecting lands which are within these clauses. And the first rule admitted is, that courts of equity will enforce a specific performance of such contract, when not in writing, when they are fully set forth in the bill and confessed in the answer,—on the ground that the mischief against which the statute was intended to guard are thereby avoided ; and, also, that the setting forth of the terms of the contract, under oath, is a virtual compliance with the requisitions of the statute.<sup>1</sup> But if the answer, although confessing the parol agreement, insists upon the statute of frauds as a defence and bar to the suit, it is now well established that specific performance will not be decreed.<sup>2</sup> Another case in which specific performance will be decreed

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<sup>1</sup> 2 Story, Eq. Jurisp. § 753, et seq., for a full statement of the doctrines relating to specific performance. Attorney-General *v.* Sitwell, 1 Younge & Coll. R. 583 ; Attorney-General *v.* Day, 1 Ves. R. 221 ; Croyston *v.* Baynes, 1 Eq. Abr. 19 ; Child *v.* Godolphin, 1 Dick. R. 39 ; Child *v.* Comber, 3 Swanst. R. 423, note ; Cottington *v.* Fletcher, 2 Atk. R. 155 ; Lacon *v.* Mertins, 3 Ibid. 3. See, however, Eyre *v.* Popham, Loftt, R. 808 ; Rondeau *v.* Wyatt, 2 H. Black. R. 68 ; The London & Birmingham Railway Co. *v.* Winter, 1 Craig & Phil. R. 57, 62.

<sup>2</sup> Whaley *v.* Bagenal, 6 Bro. Parl. R. 45 ; Walters *v.* Morgan, 2 Cox, R. 369 ; Whitbread *v.* Brockhurst, 1 Bro. Ch. R. 416, and Mr. Bott's note ; Whitchurch *v.* Bevis, 2 Bro. Ch. R. 559 ; Rondeau *v.* Wyatt, 2 H. Black. R. 68 ; Cooth *v.* Jackson, 6 Ves. R. 17 ; Rowe *v.* Teed, 15 Ibid. 375 ; Blagden *v.* Bradbear, 12 Ibid. 466 ; Leman *v.* Whitley, 4 Russ. R. 423. See, also, 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (d) ; 2 Story, Eq. Jurisp. § 755 to § 759.

is, where the contract has been partly performed,—on the ground that where one party has executed his part of the agreement in the confidence that the other party will do the same, not to enforce the contract would operate as a fraud.<sup>1</sup> A deposit, security, or payment of the purchase-money or a part thereof, though at one time thought to be sufficient to operate as a part performance,<sup>2</sup> seems now to be held not to have such an operation;<sup>3</sup> on two grounds, that the money paid may be recovered back in an action at law, and also that the statute, by expressly giving to part payment the effect of part performance in all contracts relating to goods, and omitting such a clause in relation to lands, virtually prohibits such a construction.<sup>4</sup> Nothing, therefore, is considered as a part performance unless it places the party suing for it in a situation which would operate as a fraud on him, if the agreement were not performed.<sup>5</sup> As if a vendee, upon a parol agreement for the purchase of land, should in faith thereof proceed to build a house on the land.<sup>6</sup> So, also, it should clearly appear that the acts, alleged as a part performance, were done solely with a view to the entire performance of the agreement, and

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<sup>1</sup> 2 Story, Eq. Jurisp. § 759, et seq.; Attorney-General *v.* Day, 1 Ves. R. 221; Rathbun *v.* Rathbun, 6 Barb. R. 98; Buckmaster *v.* Harrop, 7 Ves. & R. 346; Walker *v.* Walker, 2 Atk. R. 100.

<sup>2</sup> Hales *v.* Van Berchem, 2 Vern. R. 618; Owen *v.* Davies, 1 Ves. R. 82; Shett *v.* Whitmore, 2 Freem. Ch. R. 280; 3 Woodes. Lect. 57, p. 427.

<sup>3</sup> Clinan *v.* Cooke, 1 Sch. & Lefroy, R. 40; O'Herlihy *v.* Hedges, Ibid. 129; Jackson's Assignees *v.* Cutright, 5 Munf. R. 318; 2 Story, Eq. Jurisp. § 760, and cases cited; Leak *v.* Morrice, 2 Ch. R. 135; Alsopp *v.* Patten, 1 Vern. R. 472. See, also, Sugden on Vendors, ch. 3, § 3, p. 107 to 112, and cases cited; Coles *v.* Trecothick, 9 Ves. R. 234; Ex parte Hooper, 1 Maine R. 7, 8; s. c. 19 Ves. R. 479.

<sup>4</sup> 2 Story, Eq. Jurisp. § 761.

<sup>5</sup> Clinan *v.* Cooke, 1 Sch. & Lefroy, R. 40; Pengall *v.* Ross, 2 Eq. Abr. 46, pl. 12; Savage *v.* Foster, 9 Mod. R. 37; Eaton *v.* Whitaker, 18 Conn. R. 222; Tilton *v.* Tilton, 9 N. Hamp. R. 386.

<sup>6</sup> Foxcroft *v.* Lester, 2 Vern. R. 456; Wetmore *v.* White, 2 Caines' Cas. 87; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. R. 273.

were not merely ancillary or preliminary to the performance of it.<sup>1</sup> And mere possession of land, if obtained wrongfully or independently of the contract, would not be a part performance within the rule of a court in equity.<sup>2</sup> It should also clearly appear, that the contract is plain, definite, and unequivocal in all its terms, so that there shall be no ambiguity in its meaning.<sup>3</sup>

§ 1015 *ii.* These exceptions to the requirements of the statute, although well founded in authority, have not met with the thorough approbation of the courts, and they are, therefore, subject to strict construction, and cases arising under them are rigorously examined.<sup>4</sup>

§ 1015 *jj.* Another exception is to be found in cases where the agreement was intended to be reduced to writing, but was not, in consequence of the fraud of one of the parties, for courts of equity would then interfere on the ground of fraud.<sup>5</sup> If, therefore, a person intending to marry, in view thereof, promise to make a marriage settlement and to have

<sup>1</sup> Hawkins *v.* Holmes, 1 P. Wms. R. 770; Pembroke *v.* Thorpe, 3 Swanst. R. 437; Whitbread *v.* Brockhurst, 1 Bro. Ch. R. 404; Redding *v.* Wilkes, 3 Ibid. 400; Frame *v.* Dawson, 14 Ves. R. 386; Stokes *v.* Moore, 1 Cox, R. 219.

<sup>2</sup> Cole *v.* White, 1 Bro. Ch. R. 409; Wills *v.* Stradling, 3 Ves. R. 378; Frame *v.* Dawson, 14 Ves. R. 386; Butcher *v.* Stapely, 1 Vern. R. 363; Pyke *v.* Williams, 2 Ibid. 455; Gregory *v.* Mighell, 18 Ves. R. 328.

<sup>3</sup> Charnley *v.* Hansbury, 1 Harris, R. 16; 2 Story, Eq. Jurisp. § 764, and cases cited; Boardman *v.* Mostyn, 6 Ves. R. 467; Clinan *v.* Cooke, 1 Sch. & Lefroy, R. 22, 40; Savage *v.* Carroll, 2 Ball & Beat. R. 451; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. R. 283.

<sup>4</sup> 2 Story, Eq. Jurisp. § 765, and note 1; 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (c); Lindsay *v.* Lynch, 2 Sch. & Lefroy, R. 4, 5, 7; Forster *v.* Hale, 3 Ves. R. 712.

<sup>5</sup> Montacute *v.* Maxwell, 1 P. Wms. R. 618; 3 Woodes. Lect. 57, p. 432; Taylor *v.* Beech, 1 Ves. R. 297; Newl. on Cont. ch. 10, p. 191, 192, 194; Redding *v.* Wilkes, 3 Bro. Ch. R. 400.

it reduced to writing, and then fraudulently and secretly prevent it from being done, and the marriage take place, courts of equity would compel him to perform his agreement.<sup>1</sup> But in such case it should appear that there was an express promise to make the settlement in writing, and a fraudulent non-performance, and not a mere parol promise, not looking to a settlement in writing.<sup>2</sup> The real equity of the case itself, will, however, always be regarded, and no agreement will be enforced unless manifestly for equitable purposes.<sup>3</sup>

§ 1015 *kk.* In all these cases it must, of course, appear, that there were no gross laches or negligence on the part of him who seeks relief; and if there be a considerable lapse of time between the making of the agreement and the suit brought, it must be clearly explained, and shown not to operate injuriously upon the other party.<sup>4</sup> Time, however, is not generally considered

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<sup>1</sup> *Ibid.* See, also, *Dundas v. Dutens*, 1 Ves. jr. R. 196.

<sup>2</sup> *Hollis v. Whiteing*, 1 Vern. R. 151; *Whitchurch v. Bevis*, 2 Bro. Ch. R. 565; *Taylor v. Beech*, 1 Ves. R. 297.

<sup>3</sup> *Western Railroad Co. v. Babcock*, 6 Metcalf, R. 346; *Gasque v. Small*, 2 Strob. Eq. R. 72; *Webb v. Alton Mar. & Fire Ins. Co.* 5 Gilman, R. 223; *Mechanics Bank of Alexandria v. Lynn*, 1 Peters, R. 376; *Attorney-General v. Sitwell*, 1 Younge & Coll. R. 582; *King v. Hamilton*, 4 Peters, R. 311. Mr. Justice Story, in 2 Eq. Jurisp. § 769, says in this respect: "An agreement, to be entitled to be carried into specific performance, ought (as we have seen) to be certain, fair, and just in all its parts. Courts of equity will not decree a specific performance in cases of fraud or mistake; or of hard and unconscionable bargains; or where the decree would produce injustice; or where it would compel the party to an illegal or immoral act; or where it would be against public policy; or where it would involve a breach of trust; or where a performance has become impossible; and, generally, not in any cases, where such a decree would be inequitable under all the circumstances."

<sup>4</sup> *Pratt v. Law*, 9 Cranch, R. 456; *Colson v. Thompson*, 2 Wheat. R. 336; *Kendall v. Almy*, 2 Sumner, R. 278; *Doggett v. Emerson*, 3 Story, R. 740. See ante, § 497; *Taylor v. Longworth*, 14 Peters, R. 172; *Brashear v. Gratz*, 6 Wheat. R. 528.

in equity of the essence of a contract, unless it have been so treated by the parties or unless the circumstances of the case plainly so indicate.<sup>1</sup>

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<sup>1</sup> *Doggett v. Emerson*, 3 Story, R. 740; 2 Story, Eq. Jurisp. § 776, and cases cited; *Hipwell v. Knight*, 1 Younge & Coll. R. 415. See ante, § 497.

## CHAPTER XII.

## SET-OFF.

§ 1016. In the next place, as to *Set-off*. The subject of set-off is a cross debt or claim, on which a separate action might be sustained, due to the party defendant from the party plaintiff. This is a defence which is created by statute, and has no existence at common law, and we shall, therefore, only briefly allude to it, inasmuch as the rules applicable thereto are varied by the statute regulations of the different States in the United States.

§ 1017. A set-off can only be pleaded in respect of mutual debts, of a certain and definite character, and does not apply to claims founded in damages, or in the nature of penalties.<sup>1</sup> And this rule is mutual. If the suit be not for a *debt*, but for unliquidated damages, no set-off is allowable, as a general rule; as in an action for not accepting a bill of exchange;<sup>2</sup> for not accounting;<sup>3</sup> for not replacing stock according to agreement;<sup>4</sup> for breach of a covenant for quiet

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<sup>1</sup> *Morley v. Inglis*, 5 Scott, R. 314; s. c. 4 Bing. N. C. R. 58; 6 Dowl. R. 202; *Grant v. Royal Ex. Ass. Co.* 5 M. & S. R. 442; *Harcastle v. Netherwood*, 5 B. & Ald. R. 93; *Attwooll v. Attwooll*, 18 Eng. Law & Eq. R. 386.

<sup>2</sup> *Hutchinson v. Reid*, 3 Campb. R. 329.

<sup>3</sup> *Birch v. Depeyster*, 4 Campb. R. 385.

<sup>4</sup> *Gillingham v. Waskett*, 13 Price, R. 434.

enjoyment;<sup>1</sup> for breach of warranty;<sup>2</sup> for not indemnifying the plaintiff for the defendant's debt,<sup>3</sup> for an average loss on a policy of insurance.<sup>4</sup> No debt can be set off, unless it be actually due to the defendant,<sup>5</sup> at the time that the writ is issued, and continue due until the plea of set-off is made.<sup>6</sup>

§ 1018. So, also, although it is not necessary that a debt, in order to be the subject of a set-off, should be of the same nature and degree, as that upon which the action is founded; yet it must be due in the same right, and between the same parties. Thus, in an action by several persons on a claim, the defendant cannot set off a debt due from one of them to him.<sup>7</sup> So, also, a demand due to a partnership cannot be set off by a private and separate debt of one partner.<sup>8</sup> So, also, a defendant sued as an executor or administrator, cannot, in his representative capacity, set off a debt due to him personally.<sup>9</sup>

§ 1019. Merely equitable demands cannot be pleaded in set-off at law.<sup>10</sup> Thus, it has been held, that the defendant could not plead by way of set-off a bond debt of the plain-

<sup>1</sup> *Warn v. Bickford*, 7 Price, R. 550.

<sup>2</sup> *Dowd v. Faucett*, 4 Dev. R. 92.

<sup>3</sup> *Hardcastle v. Netherwood*, 5 B. & Ald. R. 93; *Attwooll v. Attwooll*, 18 Eng. Law & Eq. R. 386.

<sup>4</sup> *Castelli v. Boddington*, 16 Eng. Law & Eq. R. 127.

<sup>5</sup> *Hardy v. Corlis*, 1 Foster, R. 356; *Richards v. James*, 2 Exch. R. 471; *Kelly v. Garrett*, 1 Gilman, R. 649; *Cox v. Cooper*, 3 Ala. R. 256.

<sup>6</sup> *Carpenter v. Butterfield*, 3 Johns. Cas. 145; *Jefferson Co. Bank v. Chapman*, 19 Johns. R. 322; *Rogerson v. Ladbrooke*, 1 Bing. R. 93; s. c. 7 Moore, R. 412; *Young v. Gye*, 10 Moore, R. 198.

<sup>7</sup> *France v. White*, 6 Bing. N. C. R. 33; s. c. 8 Dowl. R. 53; *Walker v. Leighton*, 11 Mass. R. 140.

<sup>8</sup> *Walker v. Leighton*, 11 Mass. R. 140.

<sup>9</sup> *Hutchinson v. Sturges, Willes*, R. 263; *Schofield v. Corbett*, 6 N. & M. R. 527.

<sup>10</sup> *Isberg v. Bowden*, 22 Eng. Law & Eq. R. 551.

tiff, assigned to him by another person, for whose benefit it was originally given.<sup>1</sup>

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<sup>1</sup> Wake *v.* Tinkler, 16 East, R. 36; Tucker *v.* Tucker, 4 Barn. & Ad. R. 745; Wolf *v.* Beales, 6 Serg. & R. R. 244.

## CHAPTER XIII.

## PENALTIES AND LIQUIDATED DAMAGES.

§ 1020. WHERE a certain gross sum of money is reserved, in an agreement, to be paid in case of the non-performance of such agreement, it is generally to be considered as a penalty, the legal operation of which is, not to create a forfeiture of that entire sum, but only to cover the actual damages occasioned by the breach of contract.<sup>1</sup> It is not to be considered

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<sup>1</sup> The same rule also obtains in equity. *Sloman v. Walter*, 1 Bro. Ch. R. 418; *Skinner v. Dayton*, 2 Johns. Ch. R. 535; *Sanders v. Pope*, 12 Ves. R. 282; *Davis v. West*, 12 Ves. R. 475. Mr. Justice Story in his treatise on Equity Jurisp. Vol. 2, § 1314 says: “The general principle now adopted is, that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore, as intended only to secure the due performance thereof, or the damage really incurred by the non-performance. In every such case, the true test (generally, if not universally), by which to ascertain, whether relief can or cannot be had in equity, is, to consider, whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere. If it can be made, then, if the penalty is to secure the mere payment of money, courts of equity will relieve the party, upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, then courts of equity will retain the bill, and will direct an issue of *quantum damnificatus*; and, when the amount of damages is ascertained by a jury, upon the trial of such an issue, they will grant relief upon the payment of such damages. *Astley v. Weldon*, 2 Bos. & Pul. R. 346, 350; *Hardy v. Martin*, 1 Cox, R. 26;

as liquidated damages, but, in order to give such a construction of it, the party claiming such a sum must show, that it was so intended by both parties.<sup>1</sup> Calling a sum liquidated damages will not change its character as a penalty, if upon the true construction of the instrument, it must be deemed to be a penalty.<sup>2</sup> Indeed, wherever the payment of a small sum

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*Skinner v. Dayton*, 2 Johns. Ch. R. 534, 535; *Benson v. Gibson*, 3 Atk. R. 395; *Errington v. Aynsly*, 2 Bro. Ch. R. 343; Com. Dig. Chancery, 4 D. 2.

"The true foundation of the relief in equity in all these cases is, that, as the penalty is designed as a mere security, if the party obtains his money or his damages, he gets all that he expected, and all that, in justice, he is entitled to. And, notwithstanding the objections, which have been sometimes urged against it, this seems a sufficient foundation for the jurisdiction. In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty, in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said, that it is his own folly to have made such a stipulation; it may equally well be said, that the folly of one man cannot authorize gross oppression on the other side. And law, as a science, would be unworthy of the name, if it did not, to some extent, provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side; and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience on the other. There are many cases, in which courts of equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract, than in other solemn acts of parties, which are constantly interfered with by courts of equity upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation. The whole system of Equity Jurisprudence proceeds upon the ground that a party, having a legal right, shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury."

<sup>1</sup> See *Cheddick v. Marsh*, 1 N. Jersey R. 463; *Bagley v. Peddie*, 5 Sandf. R. 192; *Shute v. Taylor*, 5 Met. R. 61; *Baird v. Tolliver*, 6 Humph. R. 186; *Lindsay v. Anesley*, 6 Ired. R. 186.

<sup>2</sup> Story, Eq. Jurisp. § 1318; *Shiell v. M'Nitt*, 9 Paige, R. 101. In *Randal v. Everest*, 1 M. & M. R. 41, Abbott, Ch. J., says: "A great deal has been

is secured by the payment of a much larger sum, it must be considered as a penalty.<sup>1</sup> This is especially the case where the sum is referred to as penal in its nature.<sup>2</sup> Thus, where the defendant engaged to act as a principal comedian at Covent Garden Théâtre, for four seasons, in consideration of which the plaintiff promised to pay him £3, 6s. 8d. per night, whenever the theatre was open, and the agreement contained a clause, that if either party should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1,000 ; which sum was declared in the agreement to be liquidated, and ascertained damages, and not a penalty ; it was held by Tindal, C. J., that the sum was to be considered as a penalty ; inasmuch as it was not limited to breaches of an uncertain nature and amount, but to the breach of any stipulation, and that the payment of so large a sum for any trivial breach must be considered only as a penalty.<sup>3</sup> For where a sum certain is stipulated to be paid for the breach of any one of several covenants, the sum, although called stipulated damages, shall be construed to be a penalty, if damages

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said about the different import of the words penalty and stipulated damages, but I am of opinion, and shall always hold so, until compelled by a higher authority to say otherwise, that, whether the term penalty or liquidated damages be used in the agreement, the party shall only be allowed to recover what damages he has really sustained."

<sup>1</sup> See *Beale v. Hayes*, 5 Sandf. R. 640.

<sup>2</sup> *Tayloe v. Sandiford*, 7 Wheat. R. 13 ; *Astley v. Weldon*, 2 Bos. & Pul. R. 346 ; *Merrill v. Merrill*, 15 Mass. R. 488 ; 2 Stark. Ev. (5th Am. ed.) 620, and cases there collected ; *Boys v. Ansell*, 7 Scott, R. 364 ; s. c. 5 Bing. N. C. R. 390 ; *Davies v. Penton*, 6 B. & C. R. 216 ; *Hoag v. M'Ginnis*, 22 Wend. R. 163 ; *Perkins v. Lyman*, 11 Mass. R. 83 ; *Knapp v. Maltby*, 13 Wend. R. 587 ; *Pinkerton v. Caslon*, 2 Barn. & Ald. R. 706. See, also, *Spear v. Smith*, 1 Denio, R. 464.

<sup>3</sup> *Kemble v. Farren*, 6 Bing. R. 141 ; s. c. 3 M. & P. R. 425. But see this case examined and doubted in *Brewster v. Edgerly*, 13 N. H. R. 278. See, also, *Reilly v. Jones*, 1 Bingh. R. 303 ; *Barton v. Glover, Holt*, R. 43 ; *Galsworthy v. Strutt*, 1 Exch. R. 659. But see *Heard v. Bowers*, 23 Pick. R. 455 ; *Carpenter v. Lockhart*, 1 Cart. R. 434.

for the breach of any one of the covenants are capable of being ascertained by a jury.<sup>1</sup>

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<sup>1</sup> *Bagley v. Peddie*, 5 Sandf. R. 192. "The courts have leaned very hard in favor of construing covenants of this kind to be in the nature of penalties, instead of damages, fixed and stipulated between the parties; and, in so doing, have established certain rules, which will serve to guide us in determining this case. It may, perhaps, be justly said, that in this struggle to relieve parties from what, on a different construction, would be most improvident and absurd agreements, the courts have sometimes gone very far towards making new contracts for them, somewhat varied from the stipulations, which, under other circumstances, would be deduced from the language they used; but we believe no common law court has yet gone so far as to reduce the damages, conceded to have been liquidated and stipulated between the parties, to such an amount as the judges deem reasonable, which is the course in countries where the civil law prevails."

"Among the principles, that appear to be well established, are these:—  
1. Whether it is doubtful on the face of the instrument, whether the sum mentioned was intended to be stipulated damages, or a penalty to cover actual damages, the courts hold it to be the latter.

"2. On the contrary, where the language used is clear and explicit, to that effect, the amount is to be deemed liquidated damages, however extravagant it may appear unless the instrument be qualified by some of the circumstances hereafter mentioned.

"3. If the instrument provide that a larger sum shall be paid, on the failure of the party to pay a less sum, in the manner prescribed, the larger sum is a penalty, whatever may be the language used in describing it. \*

"4. When the covenant is for the performance of a single act, or several acts, or the abstaining from doing some particular act or acts, which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum, as damages for a violation of any such covenants, that sum is to be deemed liquidated damages, and not a penalty. The cases of *Reilly v. Jones*, 1 Bing. R. 302; *Smith v. Smith*, 4 Wend. R. 468; *Knapp v. Maltby*, 13 Ibid. 587, and *Dakin v. Williams*, 17 Ibid. 447; s. c. in error, 22 Ibid. 205, were of this class.

"5. Where the agreement secures the performance, or omission, of various acts, of the kind mentioned in the last proposition, together with one or more acts, in respect of which the damages, on a breach of the covenant, are certain, or readily ascertainable by a jury, and there is a sum stipulated as to damages, to be paid by each party to the other, for a breach of any one of the covenants, such sum is held to be a penalty merely. This was the principle of the leading case, *Astley v. Weldon*, 2 Bos. & Pull. R. 346; and of Davies

§ 1021. But where it is agreed that if a party do, or neglect to do, a particular thing, in respect to which the damages are

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v. Penton, 6 B. & Cr. R. 216; Kemble *v.* Farren, 6 Bing. R. 141; and Boys *v.* Ancell, 5 Bing. N. C. R. 390. The latter case is a little remarkable, for the reasons assigned by some of the judges for the decision of Kemble *v.* Farren, by the same court ten years before. As neither of those judges were then members of the court, and as no such reasons appear in Mr. Bingham's report of the case, we do not consider the statement in Boys *v.* Ancell to be sufficient to establish those reasons as the ground for its decision. It is true that Tindal, C. J., in pronouncing the judgment in Kemble *v.* Farren, relied on Astley *v.* Weldon and that Heath, J., in the latter case, took a distinction between a sum stipulated as damages, in respect of a single act, and a like stipulation for the performance of each of several acts, and said that the latter was to be considered a penalty. But this was clearly not the ground upon which Astley *v.* Weldon proceeded, nor was Kemble *v.* Farren decided upon any such distinction. The decision in Reilly *v.* Jones (1 Bing. R. 302), was adverse to that doctrine, as was Knapp *v.* Maltby, (13 Wend. R. 587). In the case of Boys *v.* Ancell, there was a covenant to pay the expenses of the lease, to which the sum claimed as stipulated damages was applicable, as well as to the covenant which had been broken on the other side; and as those expenses were of a certain nature, the case was, in principle, like Kemble *v.* Farren.

"Now let us apply the rules we have ascertained, to the case at bar. We prefer to pass over the first and second, and it is not claimed by the defendants that the third rule is applicable, except in connection with the fifth. They insist that the case is within the latter, and the plaintiff insists it is within the fourth proposition.

"The instrument binds the defendants to pay the 'three thousand dollars liquidated damages,' in case Charles B. Peddie should refuse to continue with, or serve the plaintiff, or should violate any of the covenants mentioned in the recited agreement between him and the plaintiff. The agreement they recited bound C. B. Peddie to the performance of numerous acts, among which he covenanted to be just, true, and faithful to the plaintiff, in all matters and things, and in nowise to wrongfully detain, embezzle, or purloin any moneys, goods, or things whatever, belonging to the plaintiff; to keep a just account of all things relating to the plaintiff's business committed to his care or management, and to give a true account of the same when required.

"We think that some of these covenants are clearly certain in their nature, and that the damages for their breach may be readily ascertained by a jury. Such is the covenant against wrongfully detaining the plaintiff's moneys or property, and that requiring C. B. Peddie to give a true account of the things committed to his management.

"The sum stipulated in the agreement as damages, applies, equally, to a

uncertain, a certain sum shall be paid him; there the sum stated may be treated as liquidated damages, if the terms of

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breach of each of these covenants, and to those upon which the complaint is founded. The defendants contend that this circumstance brings the case within the principle of the cases cited, in support of the fifth rule above laid down; while the plaintiff insists that those cases do not apply, where the stipulated damages are not mutually payable on a breach by either party.

" There is no covenant here, on the part of the plaintiff, to pay any stipulated damages. But that circumstance seems to have been of no further importance in the cases referred to, than its showing a covenant certain in its nature, which was covered by the same stipulated sum. The point on which those decisions turned, was, that the agreement contained some clauses sounding in uncertain damages, and others, relating to pecuniary payments, or measurable by a pecuniary standard, to all of which clauses, the sum stipulated as damages, applied alike, and was to become payable on a breach of any one of them. Then inasmuch as that sum could be regarded only as a penalty, in respect of the clauses payable in money, or of a certain nature, it could not be considered as any thing more than a penalty, in respect of the clauses which were in their nature uncertain. The same sum, expressed as damages, payable for a breach of any of several covenants, cannot be deemed a penalty in respect of one, and liquidated damages, for a breach of another, of those covenants. If it be stipulated damages in respect of one covenant, it must be the same as to all.

" This being the rule, it can make no difference whether the certain covenant was one of those to be performed by the party guilty of a breach of the uncertain covenant, which is the subject of the suit, or was one to be kept by the plaintiff, and, therefore, it is of no consequence whether there was, or was not, any covenant of that description, on the part of the plaintiff, covered by the sum stipulated as damages, or, in short, whether the plaintiff agreed to pay any stipulated damages at all. The principle applies, if there be any covenant, covered by the amount expressed to be paid as stipulated damages, which is certain in its nature, although all the covenants are made by the defendant.

" We are satisfied that the judge was right in his decision at the trial, that the sum payable by this agreement, was a penalty and not stipulated damages.

" The plaintiff makes a point that he should have been permitted to prove special damages, on the judge ruling that the sum stipulated was a penalty. But it does not appear that he offered to make any such proof at the trial, or that he asked a judgment for nominal damages. His complaint averred no damages, either special or nominal, and as he did not raise the question of its

the contract do not evince a different intention.<sup>1</sup> Thus, where the obligee of a bond bound himself to complete certain smith's and ironmonger's work in a church within a limited time, and in default of so doing to pay £10 per week for all the time intervening between the limited time and the time when the work should be finished, it was held that it was a case of liquidated damages, in which the sum was not to be considered as a penalty, but as an estimate of damages, which was binding on the parties. "The weekly payments," says Ashhurst, J., "are in the nature of liquidated damages, and are such a kind of penalty, if they may be called by that name, as a court of equity would not relieve against. The object of the parties in naming this weekly sum was to prevent any altercation with respect to the *quantum* of damages which the defendant might sustain by reason of the non-performance of the contract. It would have been difficult for the jury to have ascertained what damages the defendant had really suffered by the breach of the agreement; and therefore it was proper for the contracting parties to ascertain it by their agreement."<sup>2</sup> And on the same principle, where an apothecary agreed not to practise in a given circuit, *under a penalty* of £500, it was held, that the sum mentioned, though called a penalty, was in fact liquidated damages.<sup>3</sup> So in another case where the defendant became bound in the sum of £5,000,

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amendment, by motion, or of the admission of the evidence, at the trial, it is now too late to bring it forward. The judgment must be affirmed." See, also, *Curry v. Larer*, 7 Barr. R. 470; *Gower v. Saltmarsh*, 11 Mo. R. 271.

<sup>1</sup> *Astley v. Weldon*, 2 B. & P. R. 346; *1 Pothier*, by Evans, 90; *2 Ibid.* 81; *Leighton v. Wales*, 3 M. & W. R. 545; *Bringloe v. Goodson*, 8 Scott, R. 71; *Lowe v. Peers*, 4 Burr. R. 2225; *Denton v. Richmond*, 1 C. & M. R. 734; *Birch v. Stephenson*, 3 Taunt. R. 469; *Hamilton v. Overton*, 6 Blackf. R. 206; *Dakin v. Williams*, 17 Wend. R. 447; *2 Story, Eq. Jurisp.* § 1313-1318.

<sup>2</sup> *Fletcher v. Dyche*, 2 T. R. 36. See, also, *Crisdee v. Bolton*, 3 Car. & Payne, R. 241.

<sup>3</sup> *Sainter v. Ferguson*, 7 Com. B. Rep. 716. And see *Brewster v. Edgerly*, 13 N. H. R. 278.

by way of liquidated damages, and not of penalty not to carry on his trade in a certain district, the same rule was applied.<sup>1</sup>

§ 1021 a. Again, where it appears, from the nature and circumstances of the case, that the sum agreed upon has been fairly calculated, and is not grossly excessive or unjust, it will be treated as liquidated damages although the actual damages be susceptible of ascertainment.<sup>2</sup> Thus, in an agreement to pay a higher rent, in case the lessee does not reside on the premises,<sup>3</sup> or to pay \$1,000 in case of non-performance of the contract,<sup>4</sup> or not to permit a stone weir to be enlarged "under the penalty of double the yearly rent,"<sup>5</sup> or to pay a certain additional rent for every acre of land the tenant should plough,<sup>6</sup> the sums or penalties would all be treated as liquidated damages. So, also, an agreement to pay a sum of money in goods at a stipulated price will be binding, according to its terms,<sup>7</sup> unless it appear that the stipulated price is gross and unconscionable.<sup>8</sup>

§ 1022. Where the agreement has been broken, and an action of assumpsit is brought upon it for the recovery of damages, the consequential injury fairly and naturally resulting to the plaintiff from the breach will be a ground for additional compensation.<sup>9</sup> But merely speculative injuries founded

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<sup>1</sup> *Price v. Green*, 16 M. & W. R. 346.

<sup>2</sup> *Crisdee v. Bolton*, 3 Car. & Payne, R. 240; *Leland v. Stone*, 10 Mass. R. 459.

<sup>3</sup> *Ponsonby v. Adams*, 6 Bro. P. C. R. 418.

<sup>4</sup> *Mead v. Wheeler*, 13 N. H. R. 351.

<sup>5</sup> *Gerrard v. O'Reilly*, 2 Connor & Lawson, R. 165.

<sup>6</sup> *Rolfe v. Peterson*, 6 Bro. P. C. R. 436; *Birch v. Stephenson*, 3 Taunt. R. 473; *Farrant v. Olmius*, 3 Barn. & Ald. R. 692; *Jones v. Green*, 3 Younge & Jerv. R. 298.

<sup>7</sup> *Brooks v. Hubbard*, 3 Conn. R. 58.

<sup>8</sup> *Cutler v. How*, 8 Mass. R. 257; *Cutler v. Johnson*, 8 Mass. R. 266; *Baxter v. Wales*, 12 Mass. R. 365.

<sup>9</sup> *Vicars v. Wilcocks*, 8 East, R. 1; *Kendall v. Stone*, 1 Selden, R. 14;

on uncertain future contingencies,<sup>1</sup> afford no ground for damages, although damages will be given for future injury, if founded upon strong probability.<sup>2</sup> So, also, damages cannot be recovered for consequences and injuries not growing out of the breach of contract, though they be connected with the contract incidentally. Thus, an assumpsit for a breach of agreement to marry, evidence of seduction cannot be given in aggravation of damages.<sup>3</sup>

§ 1022 *a*. Whether in cases of tort, damages are to be restricted so as to afford only a compensation for the injury and for all natural and incidental injurious results, or whether they are to be allowed as punishment of the offender, and in the nature of smart money, does not seem to be conclusively settled, and there is much diversity of opinion on this point.<sup>4</sup>

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Crain *v.* Petrie, 6 Hill, R. 522; Keene *v.* Dilke, 4 Exch. R. 388; Borradaile *v.* Brunton, 2 Moore, R. 582; s. c. 8 Taunt. R. 535; Phillipotts *v.* Evans, 5 M. & W. R. 475.

<sup>1</sup> See Fox *v.* Harding, 7 Cush. R. 523; Masterton *v.* Brooklyn, 7 Hill, R. 61; Batchelder *v.* Sturgis, 3 Cush. R. 205; Freeman *v.* Clute, 3 Barbour, R. 424; Lawrence *v.* Wardwell, 6 Barb. R. 423; Donnell *v.* Jones, 17 Ala. R. 689; Fitch *v.* Livingston, 4 Sandf. R. 492.

<sup>2</sup> Hayden *v.* Cabot, 17 Mass. R. 169; Bishop *v.* Williamson, 2 Fairf. R. 504; Hodsoll *v.* Stallebrass, 8 Dowl. R. 482; s. c. 3 P. & Dav. R. 200; Howell *v.* Young, 5 B. & C. R. 259; s. c. 8 Dowl. & Ryl. R. 14; Ashley *v.* Harrison, 1 Esp. N. P. C. R. 48; Waters *v.* Towers, 20 Eng. Law & Eq. R. 410.

<sup>3</sup> Weaver *v.* Bachart, 2 Barr, R. 80. See, also, Hay *v.* Graham, Watts & Serg. R. 27.

<sup>4</sup> See the very able note of Prof. Greenleaf in his treatise on Evidence, (vol. 2, § 253,) in which all the cases are carefully analyzed. But see *contra*, Sedgwick on Damages, p. 39, who says, "Wherever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms *punitory*, *vindictive*, or *exemplary* damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender." See, also, Boston Law Reporter for June, 1817; Huckle *v.* Money, 2 Wilson, R. 205; Tullidge *v.* Wade, 3 Wilson, R. 18; Doe *v.* Filliter, 13 Mees. & Welsb. R. 47;

§ 1022 b. In a contract of sale, when the price is not paid and the articles are not delivered, the measure of damages recoverable by the vendee is their value at the time when, and the place where, they were deliverable.<sup>1</sup> If the price have been paid, he may recover the highest market value of such goods in the same place, at any time between the stipulated delivery

Brewer *v.* Dew, 11 Mees. & Welsb. R. 625; Sears *v.* Lyons, 2 Starkie, R. 317; Merest *v.* Harvey, 5 Taunt. R. 442; Whipple *v.* Walpole, 10 N. H. R. 130; Spikes *v.* English, 4 Stroh. R. 34; Jefferson *v.* Adams, 4 Harrington, R. 321; Day *v.* Woodworth, 13 Hew. R. 363; Linsley *v.* Bushnell, 15 Conn. R. 225, 273; Kendall *v.* Stone, 2 Sandf. R. 269; 1 Selden, R. 14; Gilreath *v.* Allen, 10 Iredell, R. 67; Wylie *v.* Smitherman, 8 Iredell, R. 236; Grable *v.* Margrave, 3 Scam. R. 372; McNamara *v.* King, 2 Gilman, R. 432; Sinclair *v.* Tarbox, 2 N. H. R. 135; Tillotson *v.* Cheetham, 3 Johns. R. 56; Tiffet *v.* Culver, 3 Hill, R. 180; Brizsee *v.* Maybee, 21 Wend. R. 144; Jennings *v.* Maddox, 8 B. Monroe, R. 430; Gaulden *v.* McPhaul, 4 Louis. Ann. R. 79; Neilson *v.* Morgan, 2 Martin, R. 256; King *v.* Root, 4 Wend. R. 113; Woert *v.* Jenkins, 14 Johns. R. 352; Phillips *v.* Lawrence, 6 Watts & Serg. R. 154; Amer *v.* Longstreh, 10 Penn. St. R. 148; Donnell *v.* Jones, 13 Ala. R. 490; Ralston *v.* Slate, 1 Crabbe, R. 22; Stimpson *v.* The Railroads, 1 Wallace, jr. R. 164; Boston Man. Co. *v.* Fiske, 2 Mason, R. 120; Walker *v.* Smith, 1 Wash. C. C. R. 152; Ivey *v.* McQueen, 17 Ala. R. 408, 391. But the doctrine as stated by Prof. Greenleaf is, "Damages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more, nor less; and this, whether it be to his person or estate." See also Randal *v.* Everest, 1 Mood. & Malk. R. 41; Churchill *v.* Watson, 5 Day, R. 144; Denison *v.* Hyde, 6 Conn. R. 508; Treat *v.* Barber, 7 Conn. R. 274; Brewer *v.* Dew, 11 Mees. & Welsb. R. 625; Whittemore *v.* Cutter, 1 Gallison, R. 483; 1 Rutherford, Inst. b. 1, ch. 17, § 1, p. 385, (Phil. ed. 1799); Taylor *v.* Carpenter, 10 Law Reporter, p. 35, 188; 2 Wood. & Min. R. 1. But see McBride *v.* McLaughlin, 5 Watts, R. 375; Sommer *v.* Wilt, 4 Serg. & Rawle, R. 19; The Amiable Nancy, 3 Wheat. R. 546. See also cases cited post, § 1020. See also an able article in the American Jurist, by Theron Metcalf, Esq. vol. 3, p. 287-313; Boston Law Reporter, for April, 1847. In Massachusetts, exemplary damages are not allowed for an injury also punishable by indictment. Austin *v.* Wilson, 4 Cush. R. 273. See Barnard *v.* Poor, 21 Pick. R. 378; Singleton *v.* Kennedy, 9 B. Monroe, R. 222; Whitney *v.* Hitchcock, 4 Denio, R. 461.

<sup>1</sup> See ante, § 846, and cases cited. Shepherd *v.* Hampton, 3 Wheat. R. 200; Clark *v.* Pinney, 7 Cowen, R. 681; Davis *v.* Shields, 24 Wend. R. 322.

and the trial.<sup>1</sup> Where there is a breach of warranty, the measure of damages will be the difference between the price given and the actual value of the goods at the time of the sale.<sup>2</sup> If the article be warranted to be fit for a particular purpose, the vendee is also entitled to recover what it would have been worth, had it agreed with the warranty, and for all losses directly resulting as a consequence from the breach of warranty.<sup>3</sup> Again, if the contract be broken by either party, and the other party after notice sell the goods, he may recover the difference between the price they actually bring and the contract price, as well as storage and other expenses in keeping and selling.<sup>4</sup>

§ 1022 c. In contracts for the hire of labor and services there is a distinction as to the measure of damages between a contract to perform mechanical work by the piece, and a contract for the hire of a person to serve in a particular capacity, such as an agent, clerk, laborer, or servant, for a year or a shorter time. In the former cases the measure of damages is not the entire contract price, but a compensation for the actual injury received ;<sup>5</sup> or rather, for such injury as, by reasonable endeavors and expense, he could have avoided incurring.<sup>6</sup>

§ 1022 d. But in respect to the second class of cases,

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<sup>1</sup> Ibid. *Gainsford v. Carroll*, 2 Barn. & Cres. R. 624.

<sup>2</sup> Ante, § 849; *Caswell v. Coare*, 1 Taunt. R. 566.

<sup>3</sup> Ante, § 849 a; *Freeman v. Clute*, 3 Barbour, Sup. Ct. R. 427; *Bridge v. Wain*, 1 Stark. R. 504; *Lewis v. Peake*, 7 Taunt. R. 153; *Blanchard v. Ely*, 21 Wend. R. 342.

<sup>4</sup> Ante, § 848; *Caswell v. Coare*, 1 Taunt. R. 566; *Crooks v. Moore*, 1 Sandford, Sup. Ct. R. 297.

<sup>5</sup> *Clark v. Mersiglia*, 1 Denio, R. 317; *Wilson v. Martin*, 1 Denio, R. 602; *Spencer v. Halstead*, Ibid. 606.

<sup>6</sup> *Miller v. The Mariners' Church*, 7 Greenleaf, R. 51; 2 Greenleaf on Evidence, § 261; *Davis v. Fish*, 1 Greene, R. 406; so in trespass, *Loker v. Damon*, 17 Pick. R. 284. But see contra, *Heaney v. Heeney*, 2 Denio, R. 625; *Green v. Mann*, 11 Illinois R. 613.

namely,—of agents, clerks, laborers, or hired servants, for a year or a shorter determinate time, the rule is, that if such person be improperly discharged, he may recover the entire contract price, unless it be shown that, after his dismissal, he had engaged in other business, or that employment of the same general nature and description as that for which he was hired had been offered him and been refused,—in which case the amount recoverable by him might be reduced. The burden of proof in such case is on the hirer.<sup>1</sup> Upon the same

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<sup>1</sup> *Costigan v. Mohawk & Hudson Railroad Co.* 2 Denio, R. 609. In this case the plaintiff, who had been hired as superintendent of the road, was improperly dismissed after two months' service. Beardsley, J., says: "As a general principle, nothing is better settled than that upon these facts the plaintiff is entitled to recover full pay for the entire year. He was ready during the whole time to perform his agreement, and was in no respect in fault. The contract was in full force in favor of the plaintiff, although it had been broken by the defendants. In general, in such cases, the plaintiff has a right to full pay. The rule has been applied to contracts for the hire of clerks, agents, and laborers, for a year or a shorter time, as also to the hire of domestic servants, where the contract may usually be determined by a month's notice, or on payment of a month's wages. The authorities are full and decisive upon this subject. Chit. on Cont. 5th Am. ed. 575 to 581; 1 Chit. Gen. Pr. 72 to 83; Browne on Actions at Law, 181 to 185, 504, 505; *Beeston v. Collery*, 4 Bing. R. 309; *Fawcett v. Cash*, 5 Barn. & Adolph. R. 904; *Williams v. Byrne*, 7 Adolph. & Ellis, R. 177; *Gandell v. Pontigny*, 4 Camp. R. 375; *Robinson v. Hindman*, 3 Esp. R. 235; *Smith v. Kingsford*, 3 Scott, R. 279; *Smith v. Hayward*, 7 Adolph. & Ellis, 544, *a*. In no case which I have been able to find, and we were referred to none of that character, has it ever been held or even urged by counsel, that the amount agreed to be paid should be reduced, upon the supposition that the person dismissed might have found other employment for the whole or some part of the unexpired term during which he had engaged to serve the defendant. And yet the objection might be taken in every such case, and in most of them the presumption would be much more forcible than in the case at bar. The entire novelty of such a defence affords a very strong, if not a decisive argument, against its solidity. *The Duke of Newcastle v. Clark*, 8 Taunt. R. 602. Nor do I find any case in which it was proved that other employment was offered to the plaintiff after his dismissal, and that his recovery was defeated or diminished because he refused to accept of such proffered employment.

" It has, however, been held, and rightly so, as I think, that where a sea-

principle, where a merchant agrees to furnish a given quantity of freight, and he fail so to do, he must nevertheless pay

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man, hired for the outward and return voyage, was improperly dismissed by the captain before the service was completed, a recovery of wages by the seaman, for the whole time, was proper, deducting what he had otherwise received for his services after his dismissal and during the time for which his employer was bound to make payment. Abbott on Shipp. 4th Am. ed. 442, 3; Hoyt *v.* Wildfire, 3 Johns. R. 518; Ward *v.* Ames, 9 Ibid. 138; Emerson *v.* Howland, 1 Mason, R. 51, 52.

"And upon the same principle, where a merchant engages to furnish a given quantity of freight for a ship, for a particular voyage, and fails to do so, he must pay dead freight, to the amount so agreed by him, deducting whatever may have been received from other persons, for freight taken in lieu of that which the merchant had stipulated to furnish. Abbott, 277, 278; Puller *v.* Staniforth, 11 East, R. 232; Puller *v.* Halliday, 12 Ibid. 494; Kleine *v.* Catara, 2 Gall. R. 66, 73. Upon this principle, as I understand, the case of Shannon *v.* Comstock, 21 Wend. R. 457, was decided." "The views of the chancellor, as stated in the case of Taylor *v.* Read, 4 Paige, R. 571, are to the same effect, and the propriety of the rule seems to me too apparent to admit of doubt.

"In these cases it appeared, or was offered to be shown, that the plaintiffs had in fact performed services for others, and for which they had been paid, in lieu of those they had bound themselves to perform for the defendants, and which the latter had refused to receive. In Heckscher *v.* McCrea, 24 Wend. R. 304, the court went a step further." . . . .

"The principles established by the cases referred to, seem to me just, and although I have found no case in which they have been applied to such an engagement as that between these parties, still I should have no hesitation where the facts would allow it to be done, to apply them to such a case as this.

"But first of all, the defence set up should be proved by the one who sets it up. He seeks to be benefited by a particular matter of fact, and he should therefore prove the matter alleged by him. The rule requires him to prove an affirmative fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrongdoer, and presumptions, between him and the person wronged, should be made in favor of the latter. For this reason, therefore, the *onus* must in all such cases be upon the defendant.

"Had it been shown, in the case at bar, that the plaintiff, after his dismissal, had engaged in other business, that might very well have reduced the amount which the defendants otherwise ought to pay. For this the cases I have referred to would furnish sufficient authority. But here, it appears that

dead freight to the whole amount, deducting whatever may have been received from other persons in place of what he agreed to furnish.<sup>1</sup>

§ 1022 e. In an action of trover, the measure of damages is ordinarily the value of the goods at the time of the conversion, with interest,<sup>2</sup> subject to any lien the defendant may have on the property.<sup>3</sup> By the English rule, however, the jury is permitted to find their value at a later period, and the plaintiff may allege and prove any special damage as resulting from the conversion, and thereby enhance the damages.<sup>4</sup> If the goods have been returned to the owner, or if they have

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the plaintiff was not occupied during any part of the time from the period of dismissal to the close of the year.

"Again, had it been shown on the trial, that employment of the same general nature and description with that which the contract between these parties contemplated, had been offered to the plaintiff, and had been refused by him, that might have furnished a ground for reducing the recovery below the stipulated amount. It should have been business of the same character and description, and to be carried on in the same region. The defendants had agreed to employ the plaintiff in superintending a railroad from Albany to Schenectady, and they cannot insist that he should, in order to relieve their pockets, take up the business of a farmer or a merchant. Nor could they require him to leave his home and place of residence, to engage in business of the same character with that in which he had been employed by the defendants."

<sup>1</sup> Abbott on Shipp. 277, 278; Puller *v.* Staniforth, 11 East, R. 232; Puller *v.* Halliday, 12 East, R. 494; Kleine *v.* Catara, 2 Gallison, R. 66; Shannon *v.* Comstock, 21 Wend. R. 457.

<sup>2</sup> Mercer *v.* Jones, 3 Camp. R. 477; Amery *v.* Delamere, 1 Strange, R. 505; Fisher *v.* Prince, 3 Burr. R. 1363; Finch *v.* Blount, 7 Car. & Payne, R. 478; Cook *v.* Hartle, 8 Ibid. 568; Dillenback *v.* Jerome, 7 Cowen, R. 294; Watt *v.* Potter, 2 Mason, R. 77; Johnson *v.* Sumner, 1 Metcalf, R. 172; Barry *v.* Bennett, 7 Ibid. 354; Jacoby *v.* Laussatt, 6 Serg. & Rawle, R. 300; Lillard *v.* Whitaker, 3 Bibb, R. 92.

<sup>3</sup> Fowler *v.* Gilman, 13 Met. R. 267; Chamberlin *v.* Shaw, 18 Pick. R. 283.

<sup>4</sup> Greenleaf on Evid. § 276; Greening *v.* Wilkinson, 1 Car. & Payne, R. 625; Bodley *v.* Reynolds, 10 Jurist, (Eng.) R. 310; Davis *v.* Oswell, 7 Car. & Payne, R. 804; Rogers *v.* Spence, 15 Law Jour. (n. s.) 52.

been applied for his benefit, the damages are limited to the injury actually received, such as loss of its use, &c.<sup>1</sup> But the stricter rule obtains in this country, and ordinarily only the value of the goods at the time of the conversion with interest is allowed.<sup>2</sup> But if the defendant have by his own labor

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<sup>1</sup> *Curtis v. Ward*, 20 Conn. R. 204; *Greenfield Bank v. Leavitt*, 17 Pick. R. 1; *Hunt v. Haskell*, 24 Maine R. 339.

<sup>2</sup> *Pierce v. Benjamin*, 14 Pick. R. 356; *Parks v. Boston*, 15 Ibid. 198; *Stone v. Codman*, Ibid. 297; *Greenfield Bank v. Leavitt*, 17 Pick. R. 1; *Hepburn v. Sewell*, 5 Harr. & Johns. R. 212; *Clark v. Whittaker*, 19 Conn. R. 319; *Brizsee v. Maybee*, 21 Wend. R. 144; *Farmers Bank v. Mackee*, 2 Penn. State R. 318. But see in *Suydam v. Jenkins*, 3 Sandford, R. 614, the able and elaborate judgment of Mr. Justice Duer, in which he claims that, although damages of a purely conjectural nature should never be allowed, yet that special damages may be recovered where they are clearly made out, and that although the general rule is as laid down in the text above, yet that in cases where the actual value of the goods at the time of the conversion are not a fair indemnity, additional damages should be allowed, thus agreeing to the English rule. He says: "The general question which we deem it necessary to examine is, what is the proper measure of damages, 'The rule for ascertaining the sum which the injured party ought to recover, in all cases, where personal property is wrongfully taken or detained, whether by force, by fraud, or by process of law.' It is a question of wide extent and corresponding interest, and we are not without the hope, that the observations which we intend to make may have some tendency to redeem this branch of the law from its present state of confusion and uncertainty. . . .

" Then what are the rules? What the process of computation by which the just amount of the indemnity claimed may be ascertained? We reply, with some confidence, that it will be ascertained in all cases, *by adding to the value of the property when the owner is dispossessed, the damages which he is proved to have sustained, from the loss of its possession*. It is when the property is wrongfully taken or detained, that a right of action accrues to the owner. He is then entitled to demand a compensation for his loss, and if his demand is then complied with, it is plain that the value of the property at that time, by which we mean its market value, the sum for which it could then be sold, would constitute, at least, a portion of the amount that the wrongdoer would be bound to pay. This sum may, therefore, be fairly considered as a debt then due, and, consequently, interest, until the time of trial or judgment, must in all cases be added to complete the indemnity. It is not, however, in all cases that the value of the property when the owner is dis-

enhanced the value of the goods,—as if, being logs, he has

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possessed, is to be determined by a reference to its market price, nor in all that the damages, which are to be added to the value, are to be limited to the mere allowance of interest. In most cases, the market value of the property is the best criterion of its value to the owner, but in some its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, &c., and we do not doubt that the ‘*premium affectionis*,’ instead of the market price, ought then to be considered by the jury or court, in estimating the value. In these cases, however, it is evident, that no fixed rule to govern the estimate of value, can be laid down, but it must of necessity be left to the sound discretion of a jury, in the exercise of a reasonable sympathy with the feelings of the owner. When the market price is justly assumed as the measure of value, there are numerous cases in which the addition of interest would fail to compensate the owner for his actual loss. It may be shown that had he retained the possession, he would have derived a larger profit from the use of the property than the interest upon its value; or that he had contracted to sell it to a solvent purchaser at an advance upon the market price; or that when wrongfully taken or converted, it was in the course of transportation to a profitable market, where it would certainly have arrived; and in each of these cases the difference between the market value when the right of action accrued, and the advance, which the owner, had he retained the possession, would have realized, ought plainly to be allowed as compensatory damages, and as such to be included in the amount for which judgment is rendered. So where it appears that the owner in all probability would have retained the possession of the property until the time of trial or judgment, and that it is then of greater value than when he was dispossessed, the difference may fairly be considered as a part of the actual loss resulting to him from the change of possession, and should therefore be added to the original value to complete his indemnity.

“ Even where the market value of the property, when the right of action accrued, would more than suffice to indemnify the owner, it is not, in all cases, that the liability of the wrongdoer should be limited to that amount. It is for the value that he has himself realized, or might realize, that he is bound to account, and for which judgment should be rendered against him. Hence should it appear in evidence upon the trial, that he had in fact obtained upon a sale of the property a larger price than its value when he acquired the possession, or that he still retained the possession, and that an advance price could then be obtained, in each case the increase upon the original value, (which otherwise would remain as a profit in his hands,) ought to be allowed as cumulative damages. . . . .

“ We think it follows, from the observations that have been made, and the

sawed them into boards,<sup>1</sup>— the plaintiff may recover the enhanced value of the goods, so long as they remain in the

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illustrations that have been given, that the principles which we have stated as those which ought to determine the amount of the judgment, will be carried into effect in all cases by adding to the value of the property when the right of action accrued such damages as shall cover, not only every additional loss which the owner has sustained, but every increase of value which the wrongdoer has obtained, or has it in his power to obtain ; and we are satisfied, after much consideration, that there is no other mode of computation by which as a universal and invariable rule, the same result can be attained.”

<sup>1</sup> *Baker v. Wheeler*, 8 Wend. R. 505 ; *Greenfield Bank v. Leavitt*, 17 Pick. R. 3 ; *Silsbury v. McCoon*, 3 Comst. R. 379. In this case, Ruggles, J., says : “ 1. It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass ; and if during its continuance, the wrongdoer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, or into a tool, the manufactured article still belongs to the owner of the original material and he may retake it or recover its improved value in an action for damages. And if the wrongdoer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil.

“ They agree in another respect, to wit, that if the chattel wrongfully taken, afterwards come into the hands of an *innocent holder* who believing himself to be the owner, converts the chattel into a thing of different species so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent

hands of the wrongdoer. But where the goods come into hands of a third person who acquires them *bona fide*, and he

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occupant who wrought the change ; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place. . . . .

" 2. The acknowledged principle of the civil law is that a wilful wrongdoer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made from them ; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property.

" 3. But it was thought in the court below that this doctrine had never been adopted into the common law, either in England or here ; and the distinction between a wilful and an involuntary wrongdoer herein before mentioned, was rejected not only on that ground but also because the rule was supposed to be too harsh and rigorous against the wrongdoer.

" It is true, that no case has been found in the English books in which that distinction has been expressly recognized ; but it is equally true, that in no case until the present has it been repudiated or denied. The common law on this subject was evidently borrowed from the Roman at an early day ; and at a period when the common law furnished no rule whatever in a case of this kind. Bracton, in his treatise compiled in the reign of Henry III., adopted a portion of Justinian's Institutes on this subject without noticing the distinction ; and Blackstone, in his Commentaries, vol. 2, p. 404, in stating what the Roman law was, follows Bracton, but neither of these writers intimate that on the point in question there is any difference between the civil and the common law. The authorities referred to by Blackstone in support of his text are three only. The first in Brooks's Abridgment, tit. Property 23, is the case from the Year-Book, 5 H. 7, fol. 15, (translated in a note to 4 Denio, R. 335,) in which the owner of leather brought trespass for taking slippers and boots, and the defendant pleaded that he was the owner of the leather and bailed it to J. S. who gave it to the plaintiff, who manufactured it into slippers and boots, and the defendant took them as he lawfully might. The plea was held good, and the title of the owner of the leather unchanged. The second reference is to a case in Sir Francis Moore's Reports, p. 20, in which the action was trespass for taking timber, and the defendant justified on the ground that A. entered on his land and cut down trees and made timber thereof, and car-

converts the thing by his labor into a different form or substance, so that its original identity is lost, it cannot be re-

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ried it to the place where the trespass was alleged to have been committed, and afterwards gave it to the plaintiff, and that the defendant, therefore, took the timber as he lawfully might. In these cases the chattels had passed from the hands of the original trespasser into the hands of a third person; in both it was held, that the title of the original owner was unchanged, and that he had a right to the property in its improved state against the third person in possession. They are in conformity with the rule of the civil law; and certainly fail to prove any difference between the civil and the common law on the point in question. The third case cited is from Popham's Reports, p. 38, and was a case of confusion of goods. The plaintiff voluntarily mixed his own hay with the hay of the defendant, who carried the whole away, for which he was sued in trespass; and it was adjudged that the whole should go to the defendant; and Blackstone refers to this case in support of his text, that 'our law to guard against fraud gives the entire property, without any account to him whose original dominion is invaded and endeavored to be rendered uncertain without his own consent.' The civil law in such a case would have required him who retained the whole of the mingled goods to account to the other for his share, (Just. Inst. lib. 2, tit. 1, § 28); and the common law in this particular appears to be more rigorous than the civil; and there is no good reason why it should be less so in a case like that now in hand, where the necessity of guarding against fraud is even greater than in the case of a mingling of goods, because the cases are likely to be of more frequent occurrence. Even this liability to account to him whose conduct is fraudulent, seems by the civil law to be limited to cases in which the goods are of such a nature that they may be divided into shares or portions, according to the original right of the parties; for by that law if A. obtain by fraud the parchment of B. and write upon it a poem, or wrongfully take his tablet and paint thereon a picture, B. is entitled to the written parchment and to the painted tablet, without accounting for the value of the writing or of the picture. (Just. Inst. lib. 2, tit. 1, § 23, 24.) Neither Bracton nor Blackstone have pointed out any difference except in the case of confusion of goods between the common law and the Roman, from which on this subject our law has mainly derived its principles.

" So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement, or the additional value given to it by the labor of the wrongdoer. Nay more, this rule holds good against an innocent

claimed by the owner, but he is put to his action for damages, and can recover only the value of the goods when converted.<sup>1</sup>

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purchaser from the wrongdoer, although its value be increased an hundred-fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership.

"There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whiskey in question was made of Wood's corn, than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product cannot be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation.

"4. The rule adopted by the court below seems, therefore, to be objectionable, because it operates unequally and unjustly. It not only divests the true owner of his title, without his consent; but it obliterates the distinction maintained by the civil law, and as we think by the common law, between the guilty and the innocent; and abolishes a salutary check against violence and fraud upon the rights of property.

"We think, moreover, that the law on this subject has been settled by judicial decisions in this country. In *Betts v. Lee*, (5 Johns. R. 349,) it was decided that as against a trespasser the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original materials. That was a case in which the defendant had cut down the plaintiff's trees, and made them into shingles. The property could neither be identified by inspection, nor restored to its original form; but the plaintiff recovered the value of the shingles. So in *Curtis v. Groat*, (6 Johns. R. 169,) a trespasser cut wood on another's land and converted it into charcoal. It was held that the charcoal still belonged to the owner of the wood. Here was a change of the wood into an article of different kind and species. No part of the substance of the wood remained in its original state; its identity could not be ascertained by the senses, nor could it be restored to what it originally was. That case distinctly recognizes the principle that a wilful trespasser cannot acquire a title to property merely

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<sup>1</sup> *Suydam v. Jenkins*, 3 Sandf. R. 614-629.

So, also, if the wrongdoer make a sale of the property converted by him, for a price larger than its value when he acquired possession, or if, he not having parted with it, it can be proved that an advanced price has been offered or can be obtained for the property, in each case the increased price would be allowed as damages.<sup>1</sup> If, however, a party, by *contract with the owner*, increase the value of goods by his labor, and then convert them to his own use, the original value of the goods is the measure of damages.<sup>2</sup>

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by changing it from one species to another. And the late Chancellor Kent, in his Commentaries, (vol. 2, p. 363,) declares that the English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser: and that it was settled as early as the time of the year-books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, if he could prove the identity of the original materials.

"The same rule has been adopted in Pennsylvania. (*Snyder v. Vaux*, 2 Rawle, R. 427.) And in Maine and Massachusetts it has been applied to a wilful intermixture of goods. (*Ryder v. Hathaway*, 21 Pick. R. 304, 305; *Wingate v. Smith*, 20 Maine R. 287; *Willard v. Rice*, 11 Metcalf, R. 493.") See, also, the able argument of Mr. Hill in this case, p. 381.

<sup>1</sup> *Suydam v. Jenkins*, 3 Sandf. R. 614, 624.

\* *Dresser Man. Co. v. Waterston*, 3 Met. R. 9.

## CHAPTER XIV.

## INTEREST.

§ 1023. SIMPLE interest is recoverable in action of assumpsit, or in an action upon the case, wherever there is either, 1st, an express or implied contract therefor; or, 2d, whenever there has been a *tort*, or breach of contract, whereby special damage has resulted to the party claiming it. Wherever interest is claimed upon an express or implied contract, it is a necessary incident to the original debt, and a matter of strict right, which must be allowed by the court.<sup>1</sup> But, whenever it is claimed on account of *tort*, or breach of contract, it is in the nature of damages, and is wholly in the discretion of the jury.

§ 1024. In the first place interest is allowable in all cases where there has been either an express or an implied contract therefor. If the contract be express, it must, as a matter of course, be allowed. And on a contract to pay a certain sum, at a certain time, with a stipulated rate of interest, if the principal be not paid at the specified time, the same rate of interest will be allowed after as before the breach.<sup>2</sup> A contract to pay interest will be implied either from a general mercantile usage or custom; as in the case of bills of exchange

<sup>1</sup> See Whitworth *v.* Hart, 22 Ala. R. 343.

<sup>2</sup> Morgan *v.* Jones, 20 Eng. Law & Eq. R. 454; Price *v.* Great Western Railway, 16 M. & W. R. 244.

and promissory notes, upon which in the absence of any other agreement, interest runs from the day of payment; or from demand, if they be payable on demand;<sup>1</sup> or from the issuing or service<sup>2</sup> of the writ, when no demand is made;<sup>3</sup>—or it will be implied from the particular course of dealing between the parties, or the special custom of one party known and acceded to by the other; as where it is the custom of a particular person to charge interest upon all sales made by him, after the lapse of a certain limited period; in which case, he may charge all persons with interest, who deal with him with a knowledge that such is his custom.<sup>4</sup> So, also, where by the terms of the contract, the principal is to be paid at a specific time, an agreement is always implied to make good any loss arising from default of payment at the proper time, by the payment of interest after such default.<sup>5</sup>

§ 1025. A contract to pay interest is, also, implied, whenever money is advanced, or expended, for the use of another person at his request.<sup>6</sup> If money be voluntarily expended,

<sup>1</sup> *Page v. Newman*, 9 Barn. & Cres. R. 378; *Foster v. Weston*, 6 Bing. R. 709; s. c. 4 *Moore & Payne*, R. 589; *Blaney v. Hendricks*, 2 W. Bl. R. 761.

<sup>2</sup> *Maxcy v. Knight*, 18 Ala. R. 300.

<sup>3</sup> *Pierce v. Fothergill*, 2 Bing. N. C. R. 167; s. c. 2 *Scott*, R. 334.

<sup>4</sup> *Reab v. McAlister*, 8 Wend. R. 109; *De Havilland v. Bowerbank*, 1 Camp. R. 50; *Page v. Newman*, 9 Barn. & Cres. R. 380; *Robinson v. Bland*, 2 Burr. R. 1086; *Wood v. Hickok*, 2 Wend. R. 501; *Reid v. Rens. Glass Factory*, 3 Cow. R. 436; *Calton v. Bragg*, 15 East, R. 223; *Bruce v. Hunter*, 3 Camp. R. 467; *Eaton v. Bell*, 5 Barn. & Ald. R. 34; *Nichol v. Thompson*, 1 Camp. R. 52, note; *Esterly v. Cole*, 3 Comst. R. 502.

<sup>5</sup> *Robinson v. Bland*, 2 Burr. R. 1086; *Rens. Glass Co. v. Reid*, 5 Cow. R. 611; *Porter v. Munger*, 22 Verm. R. 191; *Boddam v. Riley*, 2 Brown's Ch. Cas. 3; *Mountford v. Willes*, 2 Bos. & Pul. R. 337; *De Havilland v. Bowerbank*, 1 Camp. R. 50; *Calton v. Bragg*, 15 East, R. 223; *Easterly v. Cole*, 3 Comst. R. 502.

<sup>6</sup> The American rule stated in the text, differs from the English rule, which restricts the allowance of interest to cases, where there is either a specific day of payment, in which case interest is allowed after default; or where a contract to pay interest is implied, from either a general custom or usage, or

without the knowledge or request of the party, for whose benefit it is advanced, it is a gratuitous bailment, and would not

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from the particular course of dealing of an individual, known and assented to by the person with whom he deals; or where the money has been used and interest made upon it; or where the special circumstances of the case manifestly indicate an agreement to pay interest. The English authorities are extremely perplexing and contradictory, but the nearest statement of the English rule on this subject would seem to be, that where money is received, advanced, or expended, for the use of another, interest is not allowed thereupon, unless the money be payable at a specific time, in which case it would be allowed after default. But if it were not payable at a specific time, no interest would run thereupon, although the sum be liquidated, and an account be rendered, and a demand be made, unless, at the time of rendering the account, or demanding payment, an agreement was made to pay at a stated time. See *Pinhorn v. Tuckington*, 3 Camp. R. 467. In *Calton v. Bragg*, 15 East, R. 233, Lord Ellenborough said, speaking of a period of more than fifty years, "That no case had occurred during that period, where upon a simple contract of lending, without an agreement, for the payment of the principal at a certain time, or for interest, to run immediately, or under special circumstances, from which a contract of interest was to be inferred, had interest ever been given." This case is affirmed in *Page v. Newman*, 9 Barn. & Cres. R. 380, by Lord Tenterden, in which he says, that, "It is a rule sanctioned by the practice of more than half a century, that money lent does not carry interest." The same rule was adopted in *Hubbard v. Charlestown Branch R. R. Com.* 11 Met. R. 124. This doctrine is also declared in *De Haviland v. Bowerbank*, 1 Camp. R. 50, and *De Bernales v. Fuller*, 2 Camp. R. 427, and in *Walker v. Constable*, 1 Bos. & Pul. R. 306. In *Ekins v. East India Co.* 1 P. W. R. 396, it is said that, "If a man has my money by way of loan, he ought to answer interest," and interest was allowed; but the money was there wrongfully acquired and detained. This case was, however, affirmed upon appeal to the House of Lords; 2 Bro. Parl. Cas. 72. In *Blaney v. Hendricks*, 2 W. Black. R. 761; s. c. 3 Wils. R. 206, interest was allowed upon an account stated for money lent. So, also, in *Craven v. Tickell*, 1 Ves. jr. 60, Lord Chancellor Thurlow said, that interest must be given on money expended, since it was laid out. So, also, in *Trelawney v. Thomas*, 1 H. Black. R. 305, it was held, that interest was allowable on money lent. But the general weight of authority seems to be in favor of the rule as it has been stated in this note. The American authorities almost unanimously follow the overruled English cases, upon the ground that where money is advanced or expended, for the use of another person, such person receives all the benefit

only not draw interest, but would give no strict legal claim to the party expending it to be reimbursed for the principal. But if it be expended or advanced at the request of the person benefited, the party expending or advancing it may recover interest from the time of the payment thereof, without making any demand therefor.<sup>1</sup> Thus, if a surety, upon default of the principal, pay his debt, he may recover interest from the day of payment.<sup>2</sup> So, also, where the plaintiff agreed to build a house for the defendant, the whole expense of which over £300, the defendant agreed to pay, and a larger sum was expended, of which the plaintiff claimed to recover the overplus, and interest thereupon; it was held, that interest was allowable as claimed, it being due upon money advanced for the use of the defendant.<sup>3</sup>

· § 1025 a. In case one of several partners have advanced capital to the concern, interest will be allowed when there is an agreement or understanding to that effect.<sup>4</sup> But in the absence of any evidence of such an understanding, whether interest will be allowed, is not clearly settled. It has been held in America, that neither partner, in such case, will be entitled to interest on advances before a general settlement or dissolu-

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therefrom, and the party advancing it is deprived of the use thereof, and the interest accruing therefrom, for which it is but just that he should be compensated. If, as a matter of friendship, money be advanced, the party advancing has the privilege of waiving all demand of interest, and of principal too, if he please. So that the American rule does not oppose disinterested and generous plans.

<sup>1</sup> *Ilsley v. Jewett*, 2 Metcalf, R. 168; *Gibbs v. Bryant*, 1 Pick. R. 118; *Rens. Glass Factory v. Reid*, 5 Cow. R. 601; *Winthrop v. Carleton*, 12 Mass. R. 4; *Ekins v. East India Co.* 1 P. W. R. 396.

<sup>2</sup> *Ilsley v. Jewett*, 2 Metcalf, R. 168.

<sup>3</sup> *Craven v. Tickell*, 1 Ves. jr. R. 62. See, also, *Campbell v. Mesier*, 6 Johns. Ch. R. 21; *Dilworth v. Sinderling*, 1 Binney, R. 494; *Liotard v. Graves*, 3 Caines, R. 238; *Wood v. Robbins*, 11 Mass. R. 506.

<sup>4</sup> *Hodges v. Parker*, 17 Verm. R. 242; *Winsor v. Savage*, 9 Metcalf, R. 346; *Millaudon v. Sylvestre*, 8 Curry, (Louis.) R. 262.

tion;<sup>1</sup> but a contrary opinion has been intimated in a late case by an eminent English judge.<sup>2</sup>

§ 1026. In the next place, a contract to pay interest is implied, whenever there is a liquidated claim, or account, of which there has been a demand or notice. No interest is ever allowed upon an open and running account,<sup>3</sup> but as soon as the account is stated and rendered to the debtor, and no objection is made thereto by him, interest begins to run.<sup>4</sup> And this rule stands upon the plain ground, that the acceptance of the account, without objection, is an acknowledgment, that the debt is due then, and every delay is, of course, a default of payment, for which interest ought to run, in like manner as if the debt were payable on a specific day.<sup>5</sup> So, also, the demand

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<sup>1</sup> Lee *v.* Lashbrooke, 8 Dana, R. 214; Jones *v.* Jones, 1 Iredell, Eq. R. 332; Honore *v.* Colmesnil, 7 Dana, R. 199; Waggoner *v.* Gray, 2 H. & Mun. R. 603; Dexter *v.* Arnold, 3 Mason, R. 289.

<sup>2</sup> Millar *v.* Craig, 6 Beavan, R. 433. See, also, as to this point, Hodges *v.* Parker, 17 Verm. R. 242; Stoughton *v.* Lynch, 1 Johns. Ch. R. 467; Beacham *v.* Eckford, 2 Sandf. Chan. R. 116.

<sup>3</sup> Holliday *v.* Marshall, 7 Johns. R. 213; Newell *v.* Griswold, 6 Ibid. 45; Anon. 1 Ibid. 315; Reab *v.* McAlister, 8 Wend. R. 109; Brewer *v.* Tyringham, 12 Pick. R. 547; Esterly *v.* Cole, 3 Comst. R. 502.

<sup>4</sup> In this respect, also, the English rule differs from the American rule. The English authorities are exceedingly contradictory, and no rule can be said to be definitely settled; but the preponderance of opinion seems to affirm the doctrine, that no interest runs upon any account, although it be liquidated, or rendered, or demand be made thereof. De Havilland *v.* Bowerbank, 1 Camp. R. 50, and note; Page *v.* Newman, 9 Barn. & Cres. R. 381. See, also, Gordon *v.* Swan, 2 Camp. R. 429, note; De Bernales *v.* Fuller, Ibid. 427. The case of Boddam *v.* Riley, 2 Brown, Ch. Cas. 3, decides, that an account, after it is liquidated and rendered, creates an implied contract for interest thenceforward, because, if it be not paid then, the debtor is guilty of a default. This case was affirmed upon appeal to the House of Lords. So, also, in Blaney *v.* Hendricks, 2 W. Black. R. 761; s. c. 3 Wils. R. 206. Interest was held to be due on an account stated from the time that it was liquidated. But see the remarks of Lord Ellenborough on this last cited case, in Calton *v.* Bragg, 15 East, R. 227.

<sup>5</sup> Gammell *v.* Skinner, 2 Gall. R. 45; Walden *v.* Sherburne, 15 Johns. R.

of payment of an unsettled claim, being equivalent to the rendering of an account, entitles the party making it to interest from the time of the demand, and liquidates it if it were before unliquidated.

§ 1027. So, also, a contract to pay interest is implied, whenever money belonging to another person has been used. As where an agent pays the money of his principal into the hands of his banker, and uses it as his own. So, also, the same rule governs, where executors or assignees apply the money, which they hold as trustees, to their own use.<sup>1</sup> In respect of this rule, the English and American authorities agree.

§ 1028. These, however, are only particular instances, in which an intention is implied on the part of the debtor to pay interest. But this rule is not restricted to these cases alone; it extends to every case in which the circumstances indicate a manifest intention on the part of the creditor, to claim interest, and on the part of the debtor to accede to such a claim.

§ 1028 a. Where a contract is to be performed in the place where it is made, interest is payable according to the legal rate of such place.<sup>2</sup> But where a contract, reserving interest

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424; *Kane v. Smith*, 12 Ibid. 156; *Barnard v. Bartholomew*, 22 Pick. R. 291; *Dodge v. Perkins*, 9 Ibid. 389; *Rens. Glass Co. v. Reid*, 5 Cowen, R. 587; *King v. Diehl*, 9 Serg. & Rawle, R. 409; *Boston & Sandwich Glass Co. v. Boston*, 4 Metcalf, R. 181.

<sup>1</sup> *Rogers v. Boehm*, 2 Esp. R. 702; *Treves v. Townshend*, 1 Brown, Ch. Cas. 384; *Executors of Franklin v. Frith*, 3 Ibid. 433; *Wyman v. Hubbard*, 13 Mass. R. 232; *Adams v. Gale*, 2 Atk. R. 106; *De Havilland v. Bowerbank*, 1 Camp. R. 50; *Swindall v. Swindall*, 8 Ired. Eq. R. 285; *Davis v. Thorn*, 6 Texas R. 482; *McCreeliss v. Hinkle*, 17 Ala. R. 459; *Mathes v. Bennett*, 1 Foster, R. 188.

<sup>2</sup> *DeWolf v. Johnson*, 10 Wheat. R. 367; *Consequa v. Willings*, Peters, Cir.

in general terms, is made in one place to be performed in another, and the legal interest is different in the two places, interest will be reckoned according to the place of performance or payment, whether it be higher or lower there than at the place where the contract is made.<sup>1</sup> If, therefore, a note be made in Canada, where interest is six per cent., to be paid in England, where it is four per cent., only the English interest could be claimed; but if the note were made in England to be paid in Canada, it would bear interest of six per cent.<sup>2</sup> It has, however, been held, that if the parties expressly stipulate that the rate of interest to be paid shall be according to the place of making, such an agreement is binding, although the interest in such place be greater than that allowed at the place of payment.<sup>3</sup> Where interest is reserved higher than is legal

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Ct. R. 225; 2 Kent, Comm. Lect. 49, p. 460; Andrews *v.* Pond, 13 Peters, R. 65, 78.

<sup>1</sup> Story on Conflict of Laws, § 291, et seq. and cases cited; 2 Kent, Comm. Lect. 39, p. 460, 461, and notes; Fanning *v.* Consequa, 17 Johns. R. 511; DeWolf *v.* Johnson, 10 Wheat. R. 367; Scofield *v.* Day, 20 Johns. R. 102; Boyce *v.* Edwards, 4 Peters, R. 111; Quince *v.* Callender, 1 Dessaus. S. C. R. 160; Cooper *v.* The Earl of Waldegrave, 2 Beav. R. 282; Fergusson *v.* Fyffe, 8 Clark & Fin. R. 121; Thompson *v.* Ketcham, 4 Johns. R. 285; Healy *v.* Gorman, 3 Green, N. J. R. 328; Archer *v.* Dunn, 2 Watts & Serg. R. 328; Grant *v.* Healey, 3 Sumner, R. 523; Robinson *v.* Bland, 2 Burr. R. 1077.

<sup>2</sup> Scofield *v.* Day, 20 Johns. R. 102; Peck *v.* Mayo, 14 Verm. R. 33.

<sup>3</sup> Depau *v.* Humphreys, 20 Martin, R. 1. In this case a note was given in New Orleans payable in New York, bearing an interest of ten per cent. which was a legal rate at New Orleans; the New York interest being only seven per cent., and it was held, that it was not usurious. This case is critically considered by Mr. Justice Story in his Confliet of Laws, § 298, et seq., and after a full examination of all the foreign authorities, he says: "It is not, perhaps, too much to affirm, that the decision already alluded to of the Supreme Court of Louisiana, is not supported by the reasoning or the principles of foreign jurists. It is certainly always at variance with the doctrine maintained by Lord Mansfield and the judges of the king's bench, in a highly interesting case, (although not positively necessary to the judgment then pronounced,) that the law of the place of payment or performance, constitutes the true test by which to ascertain the validity or invalidity of contracts. And finally, in a very recent case, the Supreme Court of the United States have adopted

at either place, it would be usurious unless it be a *bonâ fide*

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the doctrine, that where a contract is made in one place, to be executed in another, it is to be governed, as to usury, by the law of the place of performance, and not by the law of the place where it is made. So that if the transaction is *bonâ fide*, and not with the intent to evade the law against usury, and the law of the place of performance allows a higher rate of interest than that permitted at the place of the contract, the parties may lawfully stipulate for the higher interest. But then the transaction must be *bonâ fide*, and not intended as a mere cover of usury. Bohier, indeed, thinks that every contract of this sort would almost, from its very terms and nature, import a design to evade the laws, and to cover usury. But he manifestly presses the presumption far beyond its legitimate application; for the circumstances of the case may often establish, that the contract is perfectly innocent and praiseworthy.

“It has been said, that if the principle be, that a contract, valid in the place where the contract is celebrated, is void, if it is contrary to the law of the place of payment, it must establish the converse proposition, that a contract, void by the law of the place where it is made, is valid, if good by the law of the place of payment. This would seem to be reasonable; and the doctrine is supported by the modern cases, notwithstanding the old cases have been supposed to lead to a contrary conclusion. In one case, a bond was executed in Ireland for a debt contracted in England; and because it constituted a security on lands in Ireland, Lord Chancellor Hardwicke held, that it was valid, although it bore the Irish interest of seven per cent. But he thought it would have been otherwise if it had been a simple contract debt; or if the bond had been executed in England. Mr. Chancellor Kent has correctly laid down the modern doctrine; and he is fully borne out by the authorities. ‘The law of the place,’ says he, ‘where the contract is made, is to determine the rate of interest, when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage on lands in another State, unless there be circumstances to show, that the parties had in view the law of the latter place in respect to interest. When that is the case, the rate of interest of the place of payment is to govern.’” But see Chapman v. Robertson, 6 Paige, R. 627, in which Chancellor Walworth supports the case of Depau v. Humphreys. See, also, 2 Kent, Comm. Lect. 39, p. 460, note. In Peck v. Mayo, 14 Verm. R. 33, where a promissory note was made in Canada, and indorsed in Vermont, in both of which places the rate of interest is six per cent., and was payable in New York at a day certain, where the rate of interest is seven per cent., it was held, that makers and indorsers were liable to pay the interest of New York. Redfield, J., in delivering the judgment of the court, said: “I consider the following rules in regard to interest

arrangement, and the interest above the legal rate be the difference of exchange, or claimed as damages.<sup>1</sup>

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on contracts, made in one country to be executed in another, to be well settled.

" 1. If a contract be entered into in one place to be performed in another, and the rate of interest differ in the two countries, the parties may stipulate for the rate of interest of either country, and thus, by their own express contract, determine with reference to the law of which country that incident of the contract shall be decided.

" 2. If the contract, so entered into, stipulate for interest generally, it shall be the rate of interest of the place of payment, unless it appear the parties intended to contract with reference to the law of the other place.

" 3. If the contract be so entered into, for money, payable at a place on a day certain, and no interest be stipulated, and payment be delayed, interest, by way of damages, shall be allowed according to the law of the place of payment, where the money may be supposed to have been required by the creditor for use, and where he might be supposed to have borrowed money to supply the deficiency thus occurring, and to have paid the rate of interest of that country."

<sup>1</sup> Andrews v. Pond, 13 Peters, R. 65, 77, 78. In this case a bill of exchange was drawn in New York, payable in Alabama, for an antecedent debt, and a discount was made from the bill greater than the interest in either State. Mr. Chief Justice Taney, in delivering the judgment of the court, said: "Another question presented by the exception, and much discussed here is, whether the validity of this contract depends upon the laws of New York or those of Alabama. So far as the mere question of usury is concerned, this question is not very important. There is no stipulation for interest apparent upon the paper. The ten per cent. in controversy is charged as the difference in exchange only, and not for interest and exchange. And if it were otherwise; the interest allowed in New York is seven per cent., and in Alabama eight; and this small difference of one per cent. per annum, upon a forbearance of sixty days, could not materially affect the rate of exchange, and could hardly have any influence on the inquiry to be made by the jury. But there are other considerations which make it necessary to decide this question. The laws of New York make void the instrument when tainted with usury; and if this bill is to be governed by the laws of New York, and if the jury should find that it was given upon an usurious consideration, the plaintiff would not be entitled to recover; unless he was a *bonâ fide* holder without notice, and had given for it a valuable consideration: while by the laws of Alabama he would be entitled to recover the principal amount of the debt, without any interest.

" The general principle in relation to contracts made in one place, to be ex-  
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§ 1028 b. The foregoing rules, however, only apply to cases where the question of usury arises, or where there is no breach of contract, and the question is, what interest is to be allowed? There is, however, another class of cases where interest is claimed by way of damages upon breach of contract, or by way of compensation for some wrong or injury done to per-

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ecuted in another, is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest, without incurring the penalties of usury. And in the case before us, if the defendants had given their note to H. M. Andrews & Co., for the debt then due to them, payable at Mobile, in sixty days with eight per cent. interest, such a contract would undoubtedly have been valid; and would have been no violation of the laws of New York, although the lawful interest in that State is only seven per cent. And, if in the account adjusted at the time this bill of exchange was given, it had appeared that Alabama interest of eight per cent. was taken for the forbearance of sixty days given by the contract; and the transaction was in other respects free from usury; such a reservation of interest would have been valid and obligatory upon the defendants; and would have been no violation of the laws of New York.

“ But that is not the question which we are now called to decide. The defendants allege that the contract was not made with reference to the laws of either State, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due; and that it was concealed under the name of exchange to evade the law. Now, if this defence is true, and shall be so found by the jury, the question is not, which law is to govern in executing the contract; but which is to decide the fate of a security taken upon a usurious agreement, which neither will execute? Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bonâ fide* agreement made in one place to be executed in another. In the last-mentioned cases the agreements were permitted by the *lex loci contractus*; and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere.” See, also, Chapman *v.* Robertson, 6 Paige, R. 627; Pecks *v.* Mayo, 14 Verm. R. 33, previous note; Story, Conflict of Laws, § 307.

sonal property; and in respect to these cases the rule is, that interest is to be reckoned according to the place where the contract is made.<sup>1</sup> If, therefore, a bill of exchange be made

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<sup>1</sup> Story, Conflict of Laws, § 314; Gibbs *v.* Fremont, 20 Eng. Law & Eq. R. 558. In this case Baron Alderson said: "The general rule in all cases like the present is, that the *lex loci contractus* is to govern in the construction of the instrument, but that applies only when the contract is not express; if it is special it must be construed according to the express terms in which it is framed. Now, a bill drawn on a third person in discharge of a present debt is, in truth, an offer by the drawer that if the payee will give time for payment, he will give an order on his debtor to pay a given sum at a given time and place. The payee agrees to accept this order, and to give the time, with a proviso that if the acceptor does not pay, and he, the payee, or the holder of the bill gives notice to the drawer of that default, the drawer shall pay him the amount specified in the bill, and lawful interest. This is, then, the contract between the parties. If the interest be expressly or by necessary implication specified on the face of the bill, then the interest is governed by the terms of the contract itself; but if not, it seems to follow the rate of interest of the place where the contract is made; so if the mode of performing it be expressly or impliedly specified, as was the case of Rothschild *v.* Currie. In the case of a bill drawn at A., it *prima facie* bears interest as a debt at A. would, if nothing else appeared; but if that bill be indorsed at B., the indorser is a new drawer, and it may be a question whether this indorsement is a new drawing of a bill at B. or only a new drawing of the same bill, that is, a bill expressly made at A. In the former case it would carry interest at the rate at B., in the latter at the rate at A.; and on this subject we find a difference of opinion in the books,—Mr. Justice Story, in his Conflict of Laws, § 314, maintaining the former, and Pardessus, Droit du Commerce, art. 1500, maintaining the latter opinion. But this case is a contract at San Francisco, by which the defendant there offers to pay to the payee, in discharge of a debt due there, the payment at Washington, by the acceptor thereof, of a given sum. That sum is not paid; the defendant's original liability then revives on notice of dishonor duly given to him, and the defendant has become liable to pay as he was liable at the first. At first he was clearly to have paid the money at San Francisco, and if he did not, he would have been liable to pay interest at the usual rate in California, for a period as long as the debt remained unpaid; and that is the amount which he ought to pay now. This point was expressly ruled in Allen *v.* Kemble. It was also so ruled in Congan *v.* Bankes; and this is not to be left to the jury, for it depends on the rule of law. The amount of interest at each place is to be so left; so is the question whether any damage has been sustained by non-payment of interest at all,

in one State, indorsed in another, and payable in a third, the rate of interest being different in each, and be dishonored, the drawer would be liable for the legal interest of the State in which he drew the bill, and the indorser of the State in which he indorsed it, and the rate of interest of the State where it was payable would not give the rule of damages.<sup>1</sup> And, although this is an apparent departure from the rule as to usury, it is said by Mr. Justice Story to be actually in conformity with it, on the ground that "the drawer and indorsers do not contract to pay the money in the foreign place in which the bill is

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for these are questions of fact. Here the jury have found interest was due, and that there was damage which ought to be recovered in the shape of interest. They also have found what the usual rate of such interest is at Washington, and what the usual rate of such interest is in California; but which rate is to be adopted by them is, so we think, a question purely of law for the direction of the judge to the jury. We think the direction in this case should have been, that the California rate of interest should be adopted by them, inasmuch as the contract was made in California; and, therefore, this rule must be absolute, to enter the verdict for the plaintiffs, with nineteen per cent. additional interest to the six per cent. already allowed."

In *Allen v. Kemble*, 6 Moore, P. C. R. 314, the court say: "The drawer, by his contract, undertakes that the drawee shall accept, and shall afterwards pay the bill according to its tenor, at the place and domicil of the drawee, if it be accepted generally; at the place appointed for payment if it be drawn and accepted payable at a different place from the place of domicil of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with the interest, damages, and costs, as the law of the country where he contracted may allow. In every case of a bill drawn in one country upon a drawee in another, the intention and agreement are, that the bill shall be paid in the country upon which it is drawn. But it is admitted that if the payment be not so made, the drawer is liable according to the laws of the country where the bill was drawn, and not upon the country upon which the bill was drawn." See, also, *Trimbey v. Vignier*, 1 Bing. N. C. R. 151; *Powers v. Lynch*, 3 Mass. R. 77; *Hicks v. Brown*, 12 Johns. R. 142; *Slacum v. Pomery*, 6 Cranch, R. 221; *Rothschild v. Currie*, 1 Adolph. & Ell. (n. s.) R. 43.

<sup>1</sup> *Powers v. Lynch*, 3 Mass. R. 77; *Williams v. Wade*, 1 Metcalf, R. 82; *Lewis v. Owen*, 4 Barn. & Ald. R. 654, and cases cited above.

drawn; but only to guarantee its acceptance and payment in that place by the drawee; and in default of such payment they agree upon due notice to reimburse the holder in principal and damages at the place where they respectively entered into the contract.”<sup>1</sup> After bills are accepted they are to be governed by the law of the place where they are payable.<sup>2</sup>

§ 1028 c. Where a debt is made payable in one country, and is afterwards sued in another country, there is some conflict of opinion whether the debt is to be estimated according to the par of exchange, or according to the actual rate of exchange, so as to place the full sum in the hands of the plaintiff in the country where the debt is payable. Some of the State courts hold, that the debt should be reckoned by the par of exchange;<sup>3</sup> but in the United States courts it has been held, that the actual rate of exchange is the true rule for estimating the sum to be recovered.<sup>4</sup>

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<sup>1</sup> Story, Conflict of Laws, § 315, citing *Potter v. Brown*, 5 East, R. 124, 130; *Dundas v. Bowler*, 3 McLean, R. 400; *Hicks v. Brown*, 12 Johns. R. 142; *Powers v. Lynch*, 3 Mass. R. 77; *Prentiss v. Savage*, 13 Ibid. 20.

<sup>2</sup> *Cooper v. Earl of Waldegrave*, 2 Beav. R. 282; *Lewis v. Owen*, 4 Barn. & Ald. R. 654; Story, Conflict of Laws, § 317; *Boyce v. Edwards*, 4 Peters, R. 111; *McCandlish v. Cruger*, 2 Bay, R. 377; *Bain v. Ackworth*, 1 Const. S. C. R. 107.

<sup>3</sup> In New York in *Martin v. Franklin*, 4 Johns. R. 124; and *Scofield v. Day*, 20 Ibid. 102. See, also, in Massachusetts, *Adams v. Cordis*, 8 Pick. R. 260. See, also, *Cockerell v. Barber*, 16 Ves. R. 461.

<sup>4</sup> *Smith v. Shaw*, 2 Wash. C. C. R. 167, 168. In *Grant v. Healey*, 3 Sumner, R. 523, Mr. Justice Story says: “I take the general doctrine to be clear, that whenever a debt is made payable in one country, and it is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay; for then, and then only, is he fully indemnified for the violation of the contract. In every such case, the plaintiff is, therefore, entitled to have the debt due to him, first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to, or subtracted from, the amount, as the case may require, in order to replace the money in the country where it ought to

§ 1029. We now come to the second class of cases, upon which interest is allowed, not as a matter of strict right, and

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be paid. It seems to me, that this doctrine is founded on the true principles of reciprocal justice.

"The question, therefore, in all cases of this sort, where there is not a known and settled commercial usage to govern them, seems to me to be rather a question of fact, than of law. In cases of accounts and advances, the object is to ascertain where, according to the intention of the parties, the balance is to be repaid, whether in the country of the creditor, or that of the debtor. In *Lannese v. Barker*, (3 Wheat. R. 101, 147,) the Supreme Court of the United States seem to have thought, that where money is advanced for a person in another State, the implied understanding is to replace it in the country where it is advanced, unless that conclusion is repelled by the agreement of the parties, or by other controlling circumstances. Governed by this rule, the money being advanced in Boston, so far as it was not reimbursed out of the proceeds of the sales at Trieste, would seem to be proper to be repaid in Boston. In relation to mere balances of account between a foreign factor and a home merchant, there may be more difficulty in ascertaining where the balance is reimbursable, whether it is where the creditor resides, or where the debtor resides. Perhaps it will be found, in the absence of all controlling circumstances, the truest rule and the easiest in its application, that advances ought to be deemed reimbursable at the place where they are made, and sales of goods to be accounted at the place where they are made or they are authorized to be made. Thus, if a consignment is made in one country for sales in another country, where the consignee resides, the true rule would seem to be to hold the consignee bound to pay the balance there, if due from him, and if due to him on advances there made, to receive the balance from the consignor there. The case of *Consequa v. Fanning*, (3 Johns. Ch. R. 587, 610,) which was reversed in 17 Johns. R. 511, proceeded upon this intelligible ground, both in the court of chancery and in the court of errors and appeals, the difference between these learned tribunals not being so much in the rule as in its application to the circumstances of that particular case.

"I am aware, that a different rule in respect to balances of accounts and debts due and payable in a foreign country, was laid down in *Martin v. Franklin*, (4 Johns. R. 125,) and *Scofield v. Day*, (20 Johns. R. 102); and that it has been followed by the Supreme Court of Massachusetts in *Adams v. C'ordis*, (8 Pick. R. 260). It is with unaffected diffidence that I venture to express a doubt as to the correctness of the decisions of these learned courts upon this point. It appears to me that the reasoning in 4 Johns. R. 125, which constitutes the basis of the other decisions, is far from being satisfactory. It states very properly that the court have nothing to do with inquiries into the dispo-

as a necessary incident to the original debt, but upon which it may be allowed by the jury by way of damages. Within this

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sition which the creditor may have of his debt, after the money has reached his hands; and the court are not to award damages upon such uncertain calculations as to the future disposition of it. But that is not, it is respectfully submitted, the point in controversy. The question is, whether, if a man has undertaken to pay a debt in one country, and the creditor is compelled to sue him for it in another country, where the money is of less value, the loss is to be borne by the creditor, who is in no fault, or by the debtor, who, by the breach of this contract, has occasioned the loss. The loss of which we here speak, is not a future contingent loss. It is positive, direct, immediate. The very rate of exchange shows, that the very same sum of money paid in the one country is not an indemnity or equivalent for it, when paid in another country, to which, by the default of the debtor, the creditor is bound to resort. Suppose a man undertakes to pay another \$10,000 in China, and violates his contract; and then he is sued therefor, in Boston, when the money, if duly paid in China, would be worth at the very moment twenty per cent. more than it is in Boston; what compensation is it to the creditor to pay him the \$10,000 at the par in Boston? Indeed, I do not perceive any just foundation for the rule, that interest is payable according to the law of the place where the contract is to be performed, except it be the very same on which a like claim may be made as to the principal, namely: That the debtor undertakes to pay there, and, therefore, is bound to put the creditor in the same situation as if he had punctually complied with his contract there.

"It is suggested, that the case of bills of exchange stands upon a distinct ground, that of usage, and is an exception from the general doctrine. I think otherwise. The usage has done nothing more than ascertain what should be the rate of damages for a violation of the contract generally, as a matter of convenience and daily occurrence in business, rather than to have a fluctuating standard, dependent upon the daily rates of exchange, exactly for the same reason, that the rule of deducting one third new for old is applied to cases of repairs of ships, and the deduction of one third from the gross freight is applied in cases of general average. It cuts off all minute calculations and inquiries into evidence. But in cases of bills of exchange drawn between countries where no such fixed rate of damages exists, the doctrine of damages, applied to the contract, is precisely that which is sought to be applied to the case of a common debt due and payable in another country; that is to say, to pay the creditor the exact sum which he ought to have received in that country. This is sufficiently clear from the case of *Mellish v. Simeon*, (2 H. Black. R. 378.) and the whole theory of reëxchange. My brother, the late Mr. Justice Washington, in the case of *Smith v. Shaw*, (2 Wash. Cir. R. 167, 168, in

class are included cases of tort, or breach of contract, whereby special damage has resulted to the party claiming it. In these cases, interest is recoverable from the time when the tort was committed, or when the contract was broken; that is, from the time when the party of whom it was claimed is in default. Thus, where a defendant has fraudulently acquired, or wrongfully detained the plaintiff's money, he is chargeable with interest from the time of his so acquiring or detaining it.<sup>1</sup> So,

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1808,) which was a suit brought by an English merchant on an account for goods shipped to the defendant's testator, where the money was doubtless to be paid in England, and a question was made, whether, it being a sterling debt, it should be turned into currency at the par of exchange, or at the then rate of exchange, held, that the debt was payable at the then rate of exchange. To which Mr. Ingersoll, at that time one of the ablest and most experienced lawyers at the Philadelphia bar, the counsel for the defendant, assented. It is said, that the point was not started at the argument, and was settled by the court suddenly, without advancing any views in the support of it. I cannot but view the case in a very different light. The point was certainly made directly to the court, and attracted its full attention. The learned judge was not a judge accustomed to come to sudden conclusions, or to decide any point which he had not most scrupulously and deliberately considered. The point was probably not at all new to him; for it must frequently have come under his notice in the vast variety of cases of debts due on accounts by Virginia debtors to British creditors, which were sued for during the period in which he possessed a most extensive practice at the Richmond bar. The circumstance that so distinguished a lawyer as Mr. Ingersoll assented to the decision, is a further proof to me, that it had been well understood in Pennsylvania to be the proper rule. If, indeed, I were disposed to indulge in any criticism, I might say, that the cases in 4 Johns. R. 125, and 20 Johns. R. 101, 102, do not appear to have been much argued or considered; for no general reasoning is to be found in either of them upon principle, and no authorities were cited. The arguments and the opinion contain little more than a dry statement and decision of the point. The first and only case, in which the question seems to have been considered upon a thorough argument, is that in 8 Pick. R. 260. I regret that I am not able to follow its authority with a satisfied assent of mind." See, also, Scott *v.* Bevan, 2 Barn. & Adolph. R. 78; Delegal *v.* Naylor, 7 Bing. R. 460.

<sup>1</sup> Dodge *v.* Perkins, 9 Pick. R. 368; Weeks *v.* Hasty, 13 Mass. R. 218; Wood *v.* Robbins, 11 Ibid. 504; The Commonwealth *v.* Crevor, 3 Binn. R. 121; Ekins *v.* East India Co. 1 P. Wms. R. 396; Gillett *v.* Maynard, 5 Johns. R. 88; The

also, where executors or administrators are guilty of a breach of trust in using money belonging to the estate which they are to administer, for their own private profit or advantage, they are chargeable with interest.<sup>1</sup> When the claim arises from tort, the form of the action will not preclude the right to interest; and there is no difference, in this respect, whether the action be assumpsit, or trespass, or trover.<sup>2</sup> Thus, it has been held, that in an action of trover, interest on the value of the chattels from the time of their conversion may be allowed by way of damages.<sup>3</sup>

§ 1030. So, also, where there is a breach of contract, the same rule governs.<sup>4</sup> Thus, where in an action on an agreement for the sale of an estate to recover the deposit, the plaintiff declared specially, and alleged, by way of special damage, that by reason, that a good title could not be made, he had been deprived of the use of the money deposited; it was held, that the plaintiff was entitled to recover interest as special damage, and that, having proved the loss of the use of his money, there was no reason why he should not be compensated therefor.<sup>5</sup>

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People *v.* Gasherie, 9 Ibid. 71; Greenly *v.* Hopkins, 10 Wend. R. 96; Crawford *v.* Willing, 4 Dall. R. 289; Slingerland *v.* Swart, 13 Johns. R. 256; Brown *v.* Campbell, 1 Serg. & Rawle, R. 179.

<sup>1</sup> Schieffelin *v.* Stewart, 1 Johns. Ch. R. 620; Boynton *v.* Dyer, 18 Pick. R. 7; Dunscomb *v.* Dunscomb, 1 Johns. Ch. R. 508; Piety *v.* Stace, 4 Ves. R. 620; 2 Williams on Executors, Pt. IV. B. ch. 11, § 11.

<sup>2</sup> The People *v.* Gasherie, 9 Johns. R. 71; Wilson *v.* Conine, 2 Ibid. 280; Pease *v.* Barber, 2 Caines, R. 266; Beals *v.* Guernsey, 8 Johns. R. 446. See Ancrum *v.* Slone, 2 Speers, R. 594; Suydam *v.* Jenkins, 3 Sandf. R. 614.

<sup>3</sup> Wilson *v.* Conine, 2 Johns. R. 280; Fisher *v.* Prince, 3 Burr. R. 1364; Buford *v.* Fannen, 1 Bay, S. C. R. 273; Fowler *v.* Shearer, 7 Mass. R. 24.

<sup>4</sup> Hovey *v.* Newton, 11 Pick. R. 421. By the English rule, interest is not due upon money wrongfully withheld, even after a demand of payment; Page *v.* Newman, 9 Barn. & Cres. R. 381; De Havilland *v.* Bowerbank, 1 Camp. R. 50; De Bernales *v.* Fuller, 2 Camp. R. 426; unless the money were payable at a specific time, or unless there were an agreement to pay interest.

<sup>5</sup> De Bernales *v.* Wood, 3 Camp. R. 258; Dawes *v.* Swan, 4 Mass. R. 208;

§ 1031. In all cases, where money is received or acquired, or detained, by mistake merely, without fraud, interest does not run upon it, until the party, in whose possession it is, is put in default, by a demand by the party to whom it is justly due; in which case, if the money be retained after demand, interest begins to run.<sup>1</sup>

§ 1032. So, also, if a party hold money not belonging to him, but it be doubtful to which of two parties claiming it, it should properly be paid, interest is not allowed, if he retain it *bonâ fide* after demand is made, until the question is settled between the parties claimant;<sup>2</sup> unless interest be made thereon by the party holding it. A mere stockholder has been held not liable for interest, although he made a profit on the money in his hands.<sup>3</sup>

§ 1033. Compound interest is never allowed, except in special cases, in which the parties, by their conduct, or agreement, give a certain portion of the interest already due, the character of principal, and make it an original debt. As where there is a settlement of accounts between the parties, and interest is computed up to the time of the settlement; or where an agreement is made therefor, subsequent to the original agreement, and referring to interest already due; or where there is a judgment, or a master's report, which is in the nature of a judgment.<sup>4</sup> And on a promissory note, payable

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Amory *v.* M'Gregor, 15 Johns. R. 24, 38. See, also, Starkie on Evid. 4th Am. ed. p. 791, and note *d*; Farr *v.* Ward, 3 Mees. & Welsb. R. 26.

<sup>1</sup> Jacobs *v.* Adams, 1 Dall. R. 52; Brown *v.* Campbell, 1 Serg. & Rawle, R. 179; King *v.* Diehl, 9 Serg. & Rawle, 409; Boston & Sandwich Glass Co. *v.* Boston, 4 Metcalf, R. 181.

<sup>2</sup> Grattan *v.* Appleton, 3 Story, R. 755; Wade *v.* Admr's of Wade, 1 Wash. C. C. R. 477.

<sup>3</sup> Jones *v.* Mallory, 22 Conn. R. 386.

<sup>4</sup> Connecticut *v.* Jackson, 1 Johns. Ch. R. 16; Waring *v.* Cunliffe, 1 Ves. jr. R. 99; Dean *v.* Williams, 17 Mass. R. 417; Brown *v.* Barkham, 1 P. Will. R. 652; Wilcox *v.* Howland, 23 Pick. R. 167; Cooley *v.* Rose, 3 Mass. R. 221; Greenleaf *v.* Kellogg, 2 Mass. R. 568.

with interest *annually*, the holder is not entitled to interest on the annual interest, unless the latter was demanded and not paid when due.<sup>1</sup> But an original agreement to allow com-

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<sup>1</sup> *Ferry v. Ferry*, 2 *Cush. R.* 97. Shaw, C. J., there said, "It has been repeatedly decided, that compound interest is not allowed by law, and it makes no difference, that by stipulation the interest is to be paid annually. The contract to pay interest at the expiration of each year is a valid contract, and may be enforced by action. *Greenleaf v. Kellogg*, 2 *Mass. R.* 568; *Cooley v. Rose*, 3 *Ibid.* 221; *Herries v. Jamieson*, 5 *T. R.* 553. So, if a new note is given for the interest, it is thereby converted into capital, and may rightfully be given with interest. *Wilcox v. Howland*, 23 *Pick. R.* 167. Or, if after interest has become due, an account is stated, making rests, it is lawful. *Eaton v. Bell*, 5 *Barn. & Ald. R.* 34. So, where partial payments have been made, in cash, or by rents and profits, or otherwise, the payments are to be first applied to the satisfaction of the interest then due, and the balance only is to go towards the reduction of the principal. *Dean v. Williams*, 17 *Mass. R.* 417; *Fay v. Bradley*, 1 *Pick. R.* 194; *Reed v. Reed*, 10 *Pick. R.* 398. This principle gives the creditor the benefit of compound interest, where payments from time to time have been made, or where after the interest becomes due he obtains security for it, or resorts to an action to enforce the payment.

" But where there has been no payment, demand, or adjustment, it has been repeatedly settled, that in ascertaining the amount due on a note, made payable with interest annually, simple interest only is to be computed. *Hastings v. Wiswall*, 8 *Mass. R.* 455; *Dean v. Williams*, 17 *Mass. R.* 417; *Von Hemert v. Porter*, 11 *Met. R.* 210. The same rule has been followed in Maine, in a case in which the reasons are very fully stated. *Doe v. Warren*, 7 *Greenl. R.* 48. The same rule is adopted in New York, in equity, and, we believe, at law. *Connecticut v. Jackson*, 1 *Johns. Ch. R.* 13; *Van Benschoten v. Lawson*, 6 *Johns. Conn. R.* 313.

" In support of the argument for allowing interest on interest, from the time it becomes due, we are referred to the case of *Dodge v. Perkins*, 9 *Pick. 368*. There is some general statement in that case, that where the payment of money due is withheld unlawfully and against right, the law will allow interest for it. Had this been a new question, depending on general principles, and not governed by precedent, the proposition stated in that case would have afforded some color to the plaintiff's claim. But it is a proposition to be taken with its well established qualifications, as well settled as the rule itself. No question was raised in that case, as to the allowance of interest on interest, and such interest was not there allowed. The only question was, whether, under the circumstances of that case, simple interest should be computed on the principal sum.

" As to the first two years interest, we think that the action is not barred

pound interest *in futuro* is not binding, because of the avaricious and usurious nature of such a contract.<sup>1</sup>

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§ 1034. This treatise on the law, relating to simple or parol contracts, is now brought to a close. It will be observed, that it has been generally restricted, in all its discussions, to the principles governing simple contracts. But, without professing fully to treat of those rules of law which appertain to specialties, they have been often incidentally adverted to, as affording illustrations of the different doctrines under consideration. It has, of course, been impossible to give any thing more than a succinct and general view of the principles applicable to those special contracts, which form the second portion of the work; but it is hoped, that that portion of the treatise, which is confined to the consideration of general principles, applicable to all contracts, will be found to embrace all that is material to assist the student to a complete understanding of the numerous cases with which the subject is encumbered.

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by the twenty years' limitation (Rev. Sts. c. 120, § 7), because the interest stipulated to be paid is regarded as incident to the debt, and recoverable with it; and, although the creditor may recover for the interest which accrues before the principal becomes due, yet if he forbear to bring his action for that purpose, as he may, the interest remains incident to the debt, and may be recovered with it.

"The case of *Peirce v. Rowe*, 1 N. H. R. 179, which was decided in 1818, is opposed to the rule adopted in this State. Whether it has since been followed in New Hampshire, we are not apprised. But, whether it has or not, we cannot find in it sufficient authority for changing what we must consider a settled rule here." See, however, *Kennon v. Dickens*, 1 Taylor, R. 231; *Doig v. Barkley*, 3 Rich. R. 125; *Singleton v. Lewis*, 2 Hill, R. 408; *Peirce v. Rowe*, 1 N. H. R. 179; *Bannister v. Roberts*, 35 Maine R. 75.

<sup>1</sup> *Lord Ossulston v. Lord Yarmouth*, 2 Salk. R. 449; *Chambers v. Goldwin*, 9 Ves. R. 271; Case of Sir Thomas Meers, cited in *Cases Temp. Talbot*, R. 40, and in 1 Atk. R. 304; *Mowry v. Bishop*, 5 Paige, R. 98; *Wilcox v. Howland*, 23 Pick. R. 167; *Hastings v. Wiswall*, 8 Mass. R. 455.

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